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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SAN MATEO COUNTY TRANSIT
DISTRICT,

Plaintiff and Appellant,

v.

TANFORAN PARK SHOPPING
CENTER, LLC, et al.,

Defendants and Appellants.

A098666, consolidated with A099788,
A099793, A101107, A101119 and
A102724

(San Mateo County
Super. Ct. No. 407836)

Introduction

These consolidated appeals and cross-appeals arise from a judgment and posttrial orders in an eminent domain proceeding brought by the San Mateo County Transit District (SamTrans) to condemn property for construction of the San Bruno Bay Area Rapid Transit (BART) station as part of BART's expansion to the San Francisco International Airport.¹ The condemned property was used to build the BART station, a multi-story BART parking garage, and a new joint San Bruno/BART Police Station. The property acquired (the take) consisted of several parcels located in the parking area of the Tanforan Park Shopping Center (Tanforan or the center) in San Bruno. None of the take involved buildings. The jury awarded defendant Owners of Tanforan (Owners)

¹ Because SamTrans was acquiring the property on behalf of BART through a cooperative agreement, SamTrans and BART were treated as a single entity.

compensation of approximately \$27.5 million, including \$8,194,123.20 for the property actually acquired and \$19,326,600 in severance damages, \$17,326,600 of which the jury identified as “attributable to parking loss.” Plaintiff SamTrans appeals the severance damages award on numerous grounds, asserting that reversal is required because, among other things: the severance damage methodology used by Owners was flawed; the severance damage award was unsupported by substantial evidence; the court erred in determining that the entire center (including property referred to as the “toothpick”) constituted the larger parcel; the court committed instructional error; certain evidence was erroneously admitted; and the court erred in excluding evidence of benefits to the center from the BART project. SamTrans also contends the court erred in refusing to require that the Owners post a bond before withdrawing money from the State Condemnation Fund pursuant to Code of Civil Procedure section 1255.250, subdivision (a).²

Owners have filed a “protective cross-appeal” challenging the court’s exclusion of property referred to as the “bone” from the larger parcel and various evidentiary rulings affecting the severance damages award.

Facts and Procedural Background

A. The Property

Tanforan is a regional shopping mall in the City of San Bruno. It was built in 1971, and its Owners as of the valuation date were Sears Roebuck & Co. (Sears), Target Corporation (Target), Tanforan Park Shopping Center LLC (TPSC LLC), Tanforan Park Shopping Center Limited Partnership (TPSC LP), Sneath Lane Associates (Sneath) and J.C. Penney. (J.C. Penney disclaimed any interest in compensation before trial.) Sears, Target and J.C. Penney anchor the center. Tanforan is bounded by Huntington Avenue to the east; Sneath Lane to the north; El Camino Real to the west; and I-380 to the south.

² All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

The total gross leasable area (GLA) of the shopping center had been approximately 986,000 square feet since 1974 to the time of trial.

On February 2, 1999, SamTrans, as BART's agent, initiated eminent domain proceedings to acquire portions of the Tanforan property by filing its complaint in this action. The valuation date was January 28, 1999.

The take property acquired by SamTrans included:

(1) Approximately 74,000 square feet within the parking area at the rear of the center west of Huntington Avenue.

(2) A portion of a parcel located east of Huntington Avenue referred to as the "porkchop" because of its shape. The southerly half of the "porkchop" was acquired in fee. The remainder was subject to SamTrans's temporary construction easement that expired in early 2003.

(3) An elongated parcel referred to as the "bone," also located east of Huntington Avenue. The "bone" was owned in fee by the City and County of San Francisco Water Department and consisted of 143,000 square feet. Part of the parcel was leased to the Owner of the "toothpick," under a lease which was to expire on May 31, 2005. The water department is not a party to this appeal.

(4) A narrow, elongated parcel referred to as the "toothpick," consisting of 46,000 square feet located east of Huntington Avenue and east of the "bone."

(5) A portion of Huntington Avenue, which was relocated pursuant to an agreement with the City of San Bruno.

There were also temporary construction and permanent underground utility easements affecting approximately 28,180 square feet of Sears's and TPSC LLC's parcels.

Ownership of the property west of Huntington Avenue is divided among Sears, TPSC LLC, J.C. Penney and Sneath. (Sneath's ownership is limited to the land under the Target store and the "porkchop.") Target leases its store on a long-term ground lease

from Sneath. The “toothpick” is owned by TPSC LP.³ Huntington Avenue is a public street and the various Owners held title to the underlying fee in the street adjacent to their property interests.

B. History

In the 1980’s, Tanforan’s then-owner, Frederick Nicholas, began developing expansion plans. Around this time, San Bruno voters began adopting referenda imposing development restrictions. Nicholas sponsored an initiative that would allow for Tanforan’s future expansion. In 1984, San Bruno voters passed an ordinance giving the City the right to approve Tanforan’s expansion, subject to certain height restrictions, without any further voter approval. The ordinance preserves the City’s discretion to approve or deny any such applications. Center Owners had hoped to expand by adding a fourth anchor store, but to the date of BART acquisition, had not been successful. In December 1998, TPSC LLC acquired the mall portion of the property and continued the efforts to entice a new department store anchor into the center. TPSC LLC management acknowledged that in order for it to increase the GLA of the center and entice quality tenants the center must first secure a new anchor store.

Since Tanforan was built, and until initiation of the BART project, the City had required the center to maintain at least a 4.94 parking ratio (i.e., 4.94 parking spaces for every 1,000 square feet of GLA.) In addition, the Owners are parties to a Reciprocal Easement Agreement (REA). The REA is a recorded easement that governs the operation of the center, giving each Owner common parking rights over the property so that it can be operated as one parcel for all tenants. The REA requires that the Owners maintain a 4.94 parking ratio. However, during negotiations with BART over allowing early access, the Owners and other members of the REA entered a 1998 Memorandum of Understanding (MOU) agreeing to temporary relief from the REA parking ratio

³ The limited partnership, TPSC LP, consists of the mall owners who retained ownership of the “toothpick” when they sold the rest of their mall property to TPSC LLC in 1998.

obligation during the construction until such time as the parking could be replaced.

A February 9, 1999 addendum to the MOU reaffirmed that the MOU would continue to be binding and that the temporary loss of parking would not violate the REA.

In the late 1980's, Nicholas became aware that BART was planning to extend its line south to the San Francisco International Airport. San Bruno City Planning Director, George Foscardo, asked Nicholas for Tanforan's support in bringing a BART station to San Bruno, next to the center. In meetings with BART's manager of real estate acquisition, Fred Arnold, Nicholas repeatedly emphasized that BART's parking garage had to be adequately sized so BART patrons would not "poach" (illegally park) on Tanforan's property and that every parking space lost to BART had to be replaced on a "one-for-one" basis. Arnold assured Nicholas in late 1997, during negotiations with the Owners for BART to obtain "early access" to Tanforan property to begin construction, that Tanforan's lost parking would be replaced on a "one-for-one" basis. Relying on these assurances, the Owners signed a License Agreement with BART on January 26, 1998.

In December 1998, Nicholas sold Tanforan to Tanforan LLC and Sneath, entities operated by Wattson-Breevast LLC. Unlike Nicholas, who lacked the financial resources to improve the center, Wattson-Breevast had the financial ability to renovate and expand Tanforan to its full potential and purchased the center for that purpose.

C. Lost Parking Issue

The central dispute between the parties concerned severance damages related to the loss of parking in the center occasioned by the take and the resulting BART project. Owners maintained that Tanforan lost over 1,128 parking spaces: 230 spaces owned by Sears east of its store and next to its Auto Center; 35 spaces near Sears's parking area and in the existing (Target) garage; 67 spaces on the "toothpick"; 508 spaces owned by Target/Sneath on the "porkchop"; and 288 "footprint" spaces lost to the construction of a

replacement garage.⁴ Included in this total were 178 spaces on the “porkchop” that SamTrans took as part of a temporary construction easement. Although SamTrans argued these spaces were not permanently lost to the center, the Owners maintained that after the BART project, parking on the “porkchop” would be physically and visually isolated from Tanforan due to relocation of Huntington Avenue and the placement of project buildings.

SamTrans contended that since the mid-1980’s the center had been able to satisfy the demand for customer parking from areas west of Huntington Avenue, even during the busiest Christmas shopping periods. They argued that even though areas east of Huntington Avenue (the “porkchop,” the “bone,” and the “toothpick”) were designated as overflow parking areas, no customers had used these areas for parking since that time. They presented evidence that in the years before the condemnation action, the “porkchop” had been leased out as Christmas tree lots during the holiday season.

D. Trial

From March through May 2001, the trial court considered 37 separate motions in limine filed by the parties. Among the court’s rulings, it denied SamTrans’s motion to exclude the Owners’ severance expert, Richard Betts. It granted the Owners’ motions to exclude SamTrans’s benefits experts, Robert Cervero and Lynn Sedway, and also excluded the Owners’ benefits expert, Walter Kieser.

The court also conducted a bench trial to determine what property of Tanforan’s constituted the “larger parcel.” The court ruled that the “bone” was not part of the larger parcel, but that the “toothpick” was. After these rulings, both sides were required to amend their valuation statements. For approximately six months, the parties argued the issues further through additional motions in limine and motions for reconsideration. The jury phase of the trial began on September 25, 2001, and lasted more than seven weeks.

⁴ Owners also maintained that the project caused the loss of 278 spaces leased by Tanforan on the “bone.” After the court’s ruling excluding the “bone” from the larger parcel, Owners conceded at trial that BART was not responsible for replacing those spaces.

The Owners' expert fee appraiser, Chris Carneghi, and SamTrans's appraiser, Paul Talmage, testified as to the value of the take property. Talmage valued the take property at \$6,962,188. Carneghi valued the take at \$9,669,489. Approximately \$1.5 million of the difference was attributable to disagreement as to the value of the "toothpick" (which Talmage valued at \$4 per square foot and Carneghi valued at \$35 per square foot); \$1 million of the difference was attributable to the value of the Sneath Lane/Target property taken. The jury awarded just compensation for the taken parcels as follows: \$440,161 to TPSC LLC; \$2,997,665 to Sears; \$4,294,218 to Sneath/Target; and \$462,080 to TPSC LP—for a total compensation of \$8,194,123 for the take property.

The biggest difference between SamTrans's and the Owners' valuation approaches at trial was on the amount of severance damages. The Owners' expert appraiser, Betts, opined that the severance damages suffered by Owners totaled \$39,175,600. SamTrans's expert appraiser, Talmage, opined that severance damages totaled \$7,599,771 before deduction of project benefits and \$6,102,615 after benefits. The jury awarded severance damages to Owners as follows: \$1,846,532 to TPSC LLC; \$9,296,465 to Sears; \$7,473,212.40 to Target/Sneath; and \$710,390.60 to TPSC LP. The total severance damages awarded amounted to \$19,326,600. The special verdict also identified that portion of the severance damages award to each Owner "attributable to parking loss." The amounts identified as "attributable to parking loss" totaled \$17,326,600.

Judgment on the jury verdict was entered on February 7, 2002. The court denied SamTrans's motion for a new trial on April 2, 2002. Postjudgment orders granting Owners their costs, requiring an increase in the compensation deposit by SamTrans, and allowing Owners to withdraw the deposit without a bond were also entered. On May 13, 2003, we denied SamTrans's request for an immediate stay and its petition for a writ regarding the order allowing Owners to withdraw \$23 million from the State Condemnation Fund without a bond.

SamTrans filed timely notices of appeal from the judgment and from various postjudgment orders. Owners timely filed a "protective cross-appeal" in the event we reversed the judgment. We ordered the appeals consolidated.

SAMTRANS'S APPEAL

I. Eminent Domain Principles

A. *Just Compensation*

“ ‘An owner is entitled to just compensation for property taken for public use. (Cal. Const., art. I, § 19; U.S. Const., 5th Amend.; Code Civ. Proc., § 1263.010.)’ (*San Diego Metropolitan Transit Development Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 925, fn. omitted [(*Cushman*)].) The principle behind the concept of just compensation is to put the owner in as good a position pecuniarily as he would have occupied if his property had not been taken. (*Ibid.*; *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1027-1028 [(*Rancho Penasquitos*)].) But it is the duty of the state to see that compensation is just not merely to the *individual whose property is taken, but to the public that is to pay for it.* (*Bauman v. Ross* (1897) 167 U.S. 548, 574 [italics added by this court].) ‘The just compensation required by the constitution to be made to the [property] owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.’ (*Ibid.*; *Los Angeles Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 716 (*Continental*) . . . ; [citation].)

“The measure of just compensation is the fair market value of the property. ([*Cushman*], *supra*, 53 Cal.App.4th at p. 925.) Under the Eminent Domain Law (§ 1230.010 et seq.), ‘[t]he fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing and able to buy but under no particular necessity for doing so, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.’ (§ 1263.320, subd. (a).)” (*City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 678 (*Rudvalis*); accord, *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 679 (*D.R. Horton*).)

“To ascertain the fair market value of a property being condemned in an eminent domain proceeding, there must be a determination of the highest and best use to which the property being condemned can be put, absent any increase or decrease in value attributable to the project itself or project influences. (See [*Rancho Penasquitos, supra*,] 105 Cal.App.4th 1013, 1028-1029.) ‘Moreover, “[a] determination of the property’s highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property; the property owner ‘is entitled to show a reasonable probability of a zoning [or other change] in the near future and thus to establish such use as the highest and best use of the property. [Citations.]’ [Citations.] The property owner has the burden of showing a reasonable probability of a change in the restrictions on the property.”’ (*Id.* at p. 1028; see also *City of San Diego v. Neumann* [(1993)] 6 Cal.4th [738,] 744 [(*Neumann*)]).

“ ‘Once the highest and best use of the property is determined, one of several approaches to valuation must be selected. Evidence Code sections 815-820 set forth various methodologies sanctioned for use by valuation experts’ (*Cushman, supra*, 53 Cal.App.4th at p. 926.)” (*D.R. Horton, supra*, 126 Cal.App.4th at p. 680.)

B. Severance Damages⁵

“ ‘When property acquired by eminent domain is part of a larger parcel, in addition to compensation for the property actually taken, the property owner must be compensated for the injury or damage, if any, to the land that he retains, reduced by the amount of benefit to the remainder.’ ([*Rudvalis, supra*,] 109 Cal.App.4th 667, 678-679,

⁵ “Section 1263.420 defines severance damages as ‘the damage, if any, caused to the remainder by either or both of the following: [¶] (a) The severance of the remainder from the part taken; [¶] (b) The construction and use of the project for which the property is taken in the manner proposed by the plaintiff, whether or not the damage is caused by a portion of the project located on the part taken.’ Severance damages ‘shall be based on the project as proposed.’ (§ 1263.450.)” (*Rudvalis, supra*, 109 Cal.App.4th at pp. 678-679.)

citing Code Civ. Proc., § 1263.410^[6] and [*Neumann, supra*,] 6 Cal.4th at p. 744.) Such ‘severance damages’ are typically measured by comparing the fair market value of the remainder before and after the taking. ([*Rudvalis*,] at p. 679; [*Neumann*,] at p. 744.) ‘In other words, “The value of the remaining property taken as a part of the whole, described as the ‘before condition,’ must be compared with the value that portion has as a result of the take and the construction of the improvement in the manner proposed, described as the ‘after condition.’ Damages are computed simply by subtracting the market value of the remainder in its after condition from the market value of the remainder in its before condition.” ’ (*Cushman, supra*, 53 Cal.App.4th at p. 926, quoting 1 Condemnation Practice in Cal. (Cont.Ed.Bar 1995) Severance Damages, § 5.9, p. 198.)” ([*D.R. Horton*], *supra*, 126 Cal.App.4th at pp. 680-681.) “The rule is established in California that severance damages ‘may be shown by proving the market value of the remainder before and after the taking and leaving the computation of the difference to the jury, or by competent evidence of severance damages in a lump sum. . . .’ (*People v. Ricciardi* [(1943) 23 Cal.2d 390, 401]; [citations].)” (*People v. Hayward Bldg. Materials Co.* (1963) 213 Cal.App.2d 457, 464-465 (*Hayward Bldg. Materials*)).

“Not every diminution in value that flows from a partial taking results in severance damages. ‘Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the [C]onstitution.’ ” (*Cushman, supra*, 53 Cal.App.4th at p. 926, fn. 2, quoting *Eachus v. Los Angeles etc. Ry. Co.* (1894) 103 Cal. 614, 617.) “ “ “To recover severance damages . . . , the loss in market value claimed must directly and proximately flow from the taking. Damage which is speculative, remote, imaginary, contingent, or merely possible . . . cannot serve as a legal basis for recovery.’ ” [Citations.]” (*Rudvalis supra*, 109 Cal.App.4th at p. 679.)

⁶ Section 1263.410 provides in pertinent part: “(a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.”

II. Larger Parcel Determination to Include “Toothpick”

At the bench trial to determine which properties constituted the larger parcel, SamTrans argued that because land was being acquired from multiple property owners, there were several larger parcels, requiring severance damages be separately calculated for each Owner, based upon what that Owner lost relative to its remaining property. Owners argued, to the contrary, that the larger parcel consisted of all the land at Tanforan and that parking severance damages should be determined based upon the impact of the taking on the remainder of the shopping center as a whole. The trial court found that all the property owned by Owners and comprising the shopping center before the taking was part of the larger parcel. This included the “toothpick” and the “porkchop” parcels east of Huntington Avenue, but did not include the “bone” owned by the City and County of San Francisco and leased to TPSC LP and J.C. Penney.

SamTrans contends that the trial court erred in determining that the larger parcel consisted of the entire shopping center. Specifically, SamTrans contends that the court erred in including the “toothpick” as a part of the larger parcel and by allowing TPSC LP, the owner of the “toothpick,” to claim severance damages where it owned no remainder property in the center and the “toothpick” was acquired in its entirety. We shall conclude the trial court did not err in including the “toothpick” as part of the larger parcel, but it did err in allowing TPSC LP to recover severance damages.

A. *Determination of the “Larger Parcel”*

In *Neumann, supra*, 6 Cal.4th 738, our California Supreme Court discussed the importance of the “larger parcel” determination: “Because severance damages are intended to compensate the property owner for the destruction of the integrity of his land [citation], the property owner must be able to demonstrate both how his property functions as an integrated unit and how the value of what remains has been injured by the taking of a part. . . . [¶] The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a ‘larger parcel’ (§ 1263.410, subd. (a)); the issue is one of law for decision by the court. [Citations.] [¶] Traditionally, three requirements must be met to

establish that the land remaining to the owner after condemnation is part of a ‘larger parcel’: (1) unity of title; (2) contiguity of the parcels; and (3) unity of use. [Citations.]” (*Neumann*, at pp. 745-746.)

“A review of the case law reveals that our courts have not always insisted on strict application of the three unities in order to conclude that a ‘larger parcel’ exists.^[7]” (*Neumann*, *supra*, 6 Cal.4th at p. 746.)

As explained by the Court of Appeal in *Emeryville Redevelopment Agency v. Harcros Pigments* (2002) 101 Cal.App.4th 1083 (*Harcros Pigments*): “[T]he court, rather than the jury, typically decides questions concerning the preconditions to recovery of a particular type of compensation, even if the determination turns on contested issues of fact.” (*Id.* at p. 1116.) “As codified in Code of Civil Procedure section 1263.410, subdivision (a), the right to [severance] damages is conditioned on a determination that ‘the property taken is part of a larger parcel.’ The determination whether this condition is present in a particular case is entrusted to the trial court. (*Neumann*, *supra*, 6 Cal.4th at p. 745; *People ex rel. Dept. Pub. Wks. v. L. A. County Flood etc. Dist.* (1967) 254 Cal.App.2d 470, 477; *City of Stockton v. Marengo* (1934) 137 Cal.App. 760, 765 [*Marengo*]). Although the question has often been described as one of ‘law’ (see *Neumann*, *supra*, 6 Cal.4th at p. 745; *People ex rel. Dept. Pub. Wks. v. L. A. County Flood etc. Dist.*, *supra*, 254 Cal.App.2d at p. 477; cf. *Marengo*, *supra*, 137 Cal.App. at p. 765 [‘essentially a question of law’]), it is decided by the court even if it involves issues of fact (see *People ex rel. Dept. Pub. Wks. v. Nyrin* (1967) 256 Cal.App.2d 288,

⁷ “The Law Revision Commission’s comment to section 1263.410 states that the definition of ‘larger parcel’ is subject to development by the courts: ‘It should be noted that the term “larger parcel” is not defined in the Eminent Domain Law, just as it was not defined in the former eminent domain provisions of the Code of Civil Procedure. The legal definition of the larger parcel is in the process of judicial development. See, e.g., *City of Los Angeles v. Wolfe*, 6 Cal.3d 326, . . . (1971) (contiguity not essential) [(*Wolfe*)]. Leaving the larger parcel definition uncoded permits continued judicial development of the concept.’ (Cal. Law Revision Com. com., 19A West’s Ann. Code Civ. Proc., [foll.] § 1263.410 (1982 ed.), p. 65.)” (*Neumann*, *supra*, 6 Cal.4th at p. 746, fn. 3.)

292 [(*Nyrin*)] [‘What constitutes a single parcel of land in the contemplation of section 1248 is essentially a question of law [citation] but may involve issues of fact. [Citations.] Insofar as the evidence is subject to opposing inferences, it must upon a review thereof, be regarded in the light most favorable to the ruling of the trial court.’]; *People ex rel. Dept. Pub. Wks. v. International Tel. & Tel. Corp.* (1972) 22 Cal.App.3d 829, 833-834 [trial court ruled ‘as matter of law’ that property taken and property remaining did not possess ‘unity of use’; reviewing court found ‘ample evidence to support the court’s findings of fact with regard to the use of the property’)]. The same is true of at least some other issues touching on the threshold entitlement to severance damages.” (*Harcros Pigments, supra*, 101 Cal.App.4th at pp. 1116-1117.)

Here, the trial court found that based upon all the factors, including, but not limited to unity of use and the REA, “the larger parcel is that parcel as defined as being subject to the requirements of the REA.” The court also found that the “bone” was not included in the larger parcel.

The evidence in this case, while not basically in conflict as to the ownership, contiguity or use of the property, is to some extent susceptible of two interpretations. “Insofar as the evidence is subject to opposing inferences, it must upon a review thereof, be regarded in the light most favorable to the ruling of the trial court. [Citations.]” (*Nyrin, supra*, 256 Cal.App.2d at p. 292.)

B. Unity of Title

Argument during the motion in limine centered around the unity of title. SamTrans argues here, as it did in the trial court, that the shopping center, determined by the court to constitute the “larger parcel,” was owned by six different entities and that “as a matter of law, only where the same entity holds legal or equitable ownership of the take and the remainder can there be unity of title.” SamTrans contends that the “toothpick” lacked unity of title with any of the other parcels, as the limited partnership TPSC LP owned only the “toothpick,” having retained title solely to the “toothpick” when the limited partnership sold the rest of its mall property to TPSC LLC in 1998. Owners

respond that the unified, integrated use of Tanforan in accordance with the REA in the circumstances presented supports the trial court's finding of unity of title.

In *Neumann, supra*, 6 Cal.4th 738, the California Supreme Court reviewed the existing case law, concluding that the courts have not always required "strict application of the three unities." (*Id.* at p. 746.) Addressing specifically the unity of title, the court stated: "[W]hile a strict construction of the requirement of unity of title would require the same person to have fee ownership of both the taken and remaining property, in *City of Stockton v. Ellingwood* (1929) 96 Cal.App. 708, 745, the Court of Appeal found that contiguous but separate parcels of property held by different owners could be considered as a larger parcel because the property was held and operated by a partnership comprised of the property owners. And, in [*Nyrin, supra*,] 256 Cal.App.2d 288, 295, the Court of Appeal stated as a general rule: ' "[T]he fact that several tracts are owned by different persons does not preclude them from being regarded as one where they are contiguous and are used in common by the owners under a contract or other arrangement and each tract is more valuable by reason of that use than if used separately." ' (See also *County of Santa Clara v. Curtner* (1966) 245 Cal.App.2d 730, 737 [owners of remaining parcel held equitable title to condemned parcel following their exercise of an option to purchase].)" (*Neumann*, at pp. 746-747.)

In the instant case, evidence was presented that the property was originally under a single ownership. To facilitate development of the property as a shopping center (conceded to be its highest and best use, whatever the intensity of the center's development), ownership of Tanforan was fractionalized. However, from the outset of the development of the shopping center and continuously thereafter, the owners had subscribed to the REA, which was critical to the development and operation of Tanforan. The REA governs the operation of the center, giving each owner common parking rights over the property so that it could be operated as one parcel for all tenants, providing reciprocal easement rights in all parking to each party and requiring that owners maintain a 4.94 parking ratio. The REA was recorded against all properties making up Tanforan.

Consequently, loss of any parking spaces affects not only the owner of the parcel losing the spaces, but all owners at the mall.

Evidence was also presented that the City required Tanforan to maintain a parking ratio of at least 4.94.

SamTrans relies upon *People ex rel. Dept. Public Works v. Dickinson* (1964) 230 Cal.App.2d 932 (*Dickinson*), which affirmed a trial court judgment finding that landowners' parcels were separate parcels where they were connected by a nonpublic road over which one landowner owned an easement of way. The Court of Appeal concluded that neither unity of ownership nor contiguity of the parcels was present. (*Id.* at p. 936.) Both parcels were leased and used for a business by a partnership comprised of the landowners. Finding the element of contiguity lacking, the appellate court also refused to assume that the use of the property for partnership purposes *necessarily* meant that the property was partnership property. (*Id.* at pp. 934, 936.) "The existence of the lease shows that the partners retained the parcels in individual ownership, effecting by the lease the right of the use for the partnership." (*Id.* at p. 934.)

Dickinson, supra, 230 Cal.App.2d 932, is distinguishable in several respects. First, in discussing the contiguity requirement, the *Dickinson* court acknowledged that the record did not describe the "quality" of the easement. (*Id.* at p. 936.) Here, unlike *Dickinson*, the nature and reciprocal impact of the REA on the property owners was before the trial court. Without the REA, the shopping center would never have existed. Second, *Dickinson* predated by nearly three decades the Supreme Court's acknowledgement in *Neumann, supra*, 6 Cal.4th 738, that strict construction of unity of title was not required. Finally, as stated above, the Court of Appeal in *Dickinson* affirmed the trial court's finding that the parcels were separate. (*Dickinson*, at pp. 933, 938.) Substantial evidence review requires that the evidence that may be subject to opposing inferences "be regarded in the light most favorable to the ruling of the trial court. [Citations.]" (*Nyrin, supra*, 256 Cal.App.2d at p. 292; accord, *Harcros Pigments, supra*, 101 Cal.App.4th at p. 1117.) Here, the trial court drew inferences from the

evidence that supported its finding of unity of title. That finding was supported by substantial evidence.

C. *Unity of Contiguity*

SamTrans contends that the “toothpick” was not contiguous to any other parcel owned by Tanforan Owners, as it was landlocked by the “bone”—which the trial court determined not to be a part of the “larger parcel.” The Supreme Court in *Neumann*, *supra*, 6 Cal.4th 738, recognized that “[o]ur insistence on contiguity has been similarly flexible.” (*Id.* at p. 747.) The *Neumann* court recognized that it had “relaxed the requirement in [*Wolfe*, *supra*,] 6 Cal.3d 326, and permitted severance damages despite the fact that the parcel taken was not physically contiguous with the remainder; we characterized the relationship between the two parcels, which was really one of interdependence of use, as ‘constructive’ or ‘legal’ contiguity. We stated: ‘Exceptions have been recognized . . . to the rule of strict physical contiguity w[h]ere the factual situation was found to warrant such an exception.’ ([*Wolfe*], *supra*, 6 Cal.3d at p. 338.)” (*Neumann*, at p. 747.)

In *Wolfe*, *supra*, 6 Cal.3d 326, the defendants owned a building that failed to satisfy requirements of a city parking ordinance. In order to obtain a conforming use status, defendants acquired property nearby, but not contiguous with the building property, to use as a parking facility. The parking facility was condemned and defendants sought severance damages. The trial court ruled against defendants, under the view that strict physical contiguity was required for an award of severance damages. The Supreme Court reversed and remanded for further proceedings on the issue of severance damages. In doing so, it recognized the general rule that “contiguity is ‘ordinarily essential’ ” (*id.* at p. 333), but held the facts of the case did not present an “ordinary” situation. (*Id.* at p. 338.) The court concluded that the facts showed “constructive or legal contiguity, although not actual physical contiguity, a strong showing of interdependent present use, and unity of ownership.” (*Id.* at p. 336.) The zoning ordinance requiring the defendants to obtain additional parking if they wished to avoid having a nonconforming building was also an important factor. (*Ibid.*) In such

circumstances, and because of the strength of the other factors, “[n]onownership of the fee underlying the private property is not a determinative factor here.” (*Ibid.*) The court concluded it was error to require strict physical contiguity in the circumstances and that a “full trial should have been held on this issue.” (*Id.* at p. 338.) *Wolfe* distinguished *Dickinson*, *supra*, 230 Cal.App.2d 932, on the ground that the *Dickinson* court had pointed out that the nature of the easement of access over the intervening parcel was in doubt. (*Wolfe*, at p. 334.) In relying on the importance of the integrated use of the parcel, the court recognized that “[u]nity of use if not the controlling factor is relevant, however, and may be considered where the properties are not physically contiguous.” (*Wolfe*, at p. 335; see also *City of Stockton v. Ellingwood*, *supra*, 96 Cal.App. at pp. 745-746 [unity of use is a factor to be considered on contiguity issue].)

SamTrans argues that access to and use of the “toothpick” for parking required use of the “bone.” At the time of valuation, the “bone” was owned by the City and County of San Francisco. It had been leased to TPSC LP since 1969, under a lease that would have expired on May 31, 2005, six years from the valuation date. SamTrans argues that the lease did not provide “permanent” access similar to that of a public street and so could not be used to support contiguity. However, the lease was in place at the time of the taking and but for the taking (which event terminated the lease by its own terms) would have provided legal access to parking on the “toothpick” for at least six more years.⁸

The evidence of the integrated use of the property and the requirements of the REA, the long-term lease of the “bone” for parking with six years remaining at the time

⁸ We note in connection with this issue that we have not considered the part of the declaration of Garrett M. Dowd, Director of the Bureau of Commercial Land Management for the City and County of San Francisco Public Utilities Commission (SFPUC), averring that had SamTrans not condemned the “bone,” he would have recommended on behalf of the SFPUC, that it enter into another long-term lease allowing the “bone” to be used by the shopping center for parking and that, based on his recommendation, it is “reasonably likely” that the Board of Supervisors would have approved another such long-term lease. The SFPUC had no other use for this land and, because of its irregular shape and location, its only practical economic use was to continue to lease the land for shopping center parking.

of the take, the City's requirement that Tanforan maintain a parking ratio of at least 4.94, and the unity of ownership found by the court, when considered together, provide substantial evidence supporting the trial court's finding of constructive contiguity.

D. Unity of Use

SamTrans also disputes the presence of the unity of use. However, it does not seriously contend that the entire shopping center was not being used as an integrated economic unit at the date of valuation. Rather, SamTrans argues first, that the court erred in considering the use of the "toothpick," where such use depended on access through the "bone." The lease to the "bone" would have expired by its terms in May 2005, and no Owner had any future interest in the "bone." SamTrans relies upon broad language in *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 531-533 (*Handlery Hotel*): "A tenant's right of renewal of a lease refers to a legal right, and this exists only when the lease expressly grants to the tenant the option to renew the lease at the end of its term. A mere expectation, or even probability, that the lease will be renewed based upon past practice and present good relations between landlord and tenant, is not a legal right of renewal. It is nothing more than a speculation on chance. Intentions which are subject to change at the will of a landlord do not constitute an interest in land so as to confer upon the tenants something to be valued and compensated for in a condemnation action." (*Id.* at pp. 531-532; accord, *Rudvalis, supra*, 109 Cal.App.4th at pp. 683-685 & fn. 9; but see *Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 370-373 (*Attisha*) [evidence of tenant's reasonable expectation of lease renewal admissible in valuing goodwill loss].)⁹

⁹ As we have indicated, our conclusion that substantial evidence supports the court's determination of the larger parcel does not rely upon evidence of the probable renegotiation and renewal of the long-term lease following its May 2005 expiration. Nor does it appear that the trial court relied upon such evidence. Nevertheless, in the circumstances presented here, we believe this evidence was relevant and appropriate to the determination, despite the broad contrary language contained in *Handlery Hotel, supra*, 73 Cal.App.4th 517. The case did not discuss the issue of the "larger parcel" or any question of the three unities or the "unity of use" at all. It has been described as "an

However, the same court that decided *Handlery Hotel* later distinguished it on its facts despite the above-quoted “broad language lending support to the Agency’s position” (*Attisha*, at p. 372.) In *Attisha*, Division One of the Fourth District Court of Appeal held that the trial court abused its discretion in striking the lessee’s expert’s testimony as to the goodwill valuation of a market. The trial court had relied upon *Handlery Hotel*, which it viewed as holding that evidence of a tenant’s expectation of a lease renewal was inadmissible as a matter of law. (*Attisha*, at pp. 370, 372.) In *Attisha*, the lessee showed that as of the valuation date, seven years remained on the lease. Thus, “[i]n contrast to *Handlery*, the [lessees] did have a property interest. . . . *Handlery* does not suggest that when condemnation caused termination of a lease and the tenant’s entitlement to goodwill is established, evidence of his or her reasonable expectation of a lease renewal is inadmissible as a matter of law in valuing goodwill loss.” (*Attisha*, at p. 372.) *Attisha* noted that while *Handlery*’s successive short-term lease extensions defined the length of time it reasonably expected to remain in business, it had observed in *Handlery* that, “ ‘[t]his is not the case where the impending expropriation constituted the sole reason for shortening what would otherwise have been a longer lease term in a well-established and mutually satisfactory lessor-lessee relationship, giving rise to recovery of business losses

inverse condemnation proceeding [wherein] the holder of a long-term lease to operate a golf course that had expired by its own terms could not sustain a claim for loss of goodwill because when the lease expired the business of operating the golf course ceased. Successive short-term lease extensions culminating with a month-to-month tenancy terminable on seven days’ notice merely operated to define the length of time the leaseholder could reasonably expect to remain in the business of operating the golf course.” (14 Dankert, Cal. Real Estate Law & Practice (Matthew Bender 2006) § 513.41[6], p. 513-40.6.)

We also note that in *Handlery Hotel*, the appellate court *affirmed* the trial court finding denying compensation for the lease, concluding that “substantial evidence supports the trial court’s conclusion *Handlery*’s expectation of renewal was speculative at best. *Handlery*’s interest in the property would have ended any way upon development of the property; the owners wished to regain control of the property; *Handlery* had made a ‘low ball’ lease proposal that was not close to what the owners had expected; and *Handlery* faced an uphill battle with the [fee owners of the property]. . . .” (*Handlery Hotel*, *supra*, 73 Cal.App.4th at p. 532, fn. 14.)

beyond the expiration of the original lease term.’ (*Handlery, supra*, 73 Cal.App.4th at p. 538, fn. 22, italics added [by *Attisha* court].)” (*Attisha*, at p. 372.) Where the evidence showed a likelihood of a continued lease, given the history of lease renewals, the evidence was admissible and the court abused its discretion in refusing to allow the jury to consider it. (*Id.* at p. 373.)

As we have indicated heretofore, TPSC LP’s leasehold interest in the “bone” at the time of the taking and the Owners’ legal right to continue using the “bone” for parking for six years from the valuation date, combined with strong evidence of the use of the shopping center as an interdependent and integrated unit at the date of valuation, supports the trial court’s determination that the “toothpick” was part of the larger parcel here, regardless whether evidence of the probable lease renewal is considered. “[I]f the landowner establishes that there is a reasonable probability his contiguous commonly owned lots are or will be available for development or use as an integrated economic unit in the reasonably foreseeable future, all of the separate lots may be considered as a larger parcel for purposes of awarding severance damages.” (*Neumann, supra*, 6 Cal.4th at p. 756.)

E. Highest and Best Use

SamTrans also contends the court erred in determining the larger parcel because it allowed Owners to rely upon two different highest and best uses: one for determination of the larger parcel, and a different one (involving remodeling and expansion of shopping center GLA) for appraiser Betts’s determination of severance damages.¹⁰ SamTrans concedes in its opening brief that “the only evidence presented by the owners in the trial of the larger parcel was evidence relating to their existing use of the property.” However, it focuses on the allegedly inconsistent testimony by Betts at the jury trial on severance damages that the highest and best use of the property was for a redeveloped shopping

¹⁰ SamTrans pursues this alternative argument in more detail in a separate claim of error, contending that the court erred in allowing Betts to testify to a highest and best use for the shopping center other than its existing use, and we address the alleged incompatibility issue in connection with that argument.

center, with an expanded GLA, and attacks that testimony as concerning future uses unsupported by the evidence. We agree with Owners that SamTrans has confused highest and best use for valuation purposes with unified use for determining the larger parcel.

We conclude on the record before us that substantial evidence was presented to the court at the larger parcel hearing that all parcels of the property (including the “toothpick”) were used at the date of valuation as an integrated economic unit and comprised the then-existing Tanforan shopping center. That an arguably inconsistent theory was presented by Owners at the jury trial on severance damages does not undermine the court’s threshold determination that the “larger parcel” was comprised of the entire existing shopping center, including the “toothpick,” but not including the “bone.”

F. Award of Severance Damages to TPSC LP

SamTrans contends the court erred in permitting TPSC LP, the owner of the “toothpick,” to recover severance damages of \$710,390.60 where the “toothpick” was taken in its entirety and TPSC LP owned no other property in the shopping center. SamTrans argues that there was no remainder owned by TPSC LP to be damaged. We agree.

It is undisputed that TPSC LP owned part of the “toothpick” and that it owned no other property in the center. At the jury trial on condemnation damages, Betts acknowledged that the limited partnership did not own any other property in the remaining shopping center after the taking of the “toothpick” and that TPSC LP had no parcel of property that was going to be diminished in value as a result of the loss of the “toothpick.” “They simply have a debt that they have to pay.” Betts maintained, however, that TPSC LP had suffered severance damages because it was obligated under the REA to put any money it received for lost parking into replacement of parking.¹¹

¹¹ “Q. [Ms. Beasley] Okay. Now, the limited partnership does not own any of the property in the remaining shopping center, do they?”

“[A]ny money that is obtained for lost parking, no matter what the reason for the lost parking . . . has to go into a pot controlled by a trustee, not by any of the parties, . . . and it has to be spent on replacement parking.”

Betts also testified that because TPSC LP had a partial ownership interest in TPSC LLC and in Sneath, TPSC LP “has a partial interest in everything in the center except the Penney’s parcel, the Sears parcel.”

On appeal, Owners contend that the trial court correctly allowed TPSC LP to recover severance damages for lost parking, asserting that the limited partnership had an interest in the remainder of the center. Owners argue that the REA gave the owner of each parcel at Tanforan an interest in all of the remaining parcels, and a corresponding interest in replacing the lost parking. Thus, taking the entire “toothpick” did not take all of TPSC LP’s interests, and damages for the parking lost on the “toothpick” were properly awarded as part of the severance damages. Owners also argue that TPSC LP not only retained an interest in the remainder as a party to the REA, but also as part owner of respondents Sneath and TPSC LLC, who have ownership interests in the remainder. We cannot accept Owners’ reasoning.

“A. [Betts] That’s correct.

“Q. So, the limited partnership has no parcel of property that is going to be diminished in value as a result of the loss of the Toothpick, do they?

“A. No. They have a legal obligation to pay their share to replace the lost parking spaces, therefore there is a debt that they owe that is tied to their ownership of the property. [¶] . . . [¶]

“Q. The limited partnership has no parcel of property that is going to be diminished in value as a result of the loss of the Toothpick, do they?

“A. That’s correct. They simply have a debt that they have to pay.

“Q. Okay. So, it is your testimony that the owner of the Toothpick is going to have to build a garage, even though they don’t own any property in the shopping center; is that right?

“A. That’s correct. The REA commits them to put any money that they receive for lost parking into replacement of parking. They don’t have to come up with a site, but they have to put the money in escrow, in the hands of a trustee.”

As TPSC LP owned only the “toothpick,” and the “toothpick” was taken in its entirety by the condemnation, TPSC LP has no other interest in the remainder upon which to base its recovery of severance damages. The parties have cited no case, and we have found none, that allows a property owner who owns no interest in the remainder property to recover severance damages. As stated in *Nyrin, supra*, 256 Cal.App.2d 288, “[T]here can be no recovery in condemnation where there has been no actual taking or severance of the claimant’s property.” (*Id.* at p. 296.)

Condemnation of the “toothpick” extinguished the reciprocal easements that were appurtenant to the “toothpick” benefiting the parcels comprising the remainder. Owners of the remaining property were entitled to recover damages for the loss of that interest. “[T]he taking of a fee interest by condemnation may necessarily result in the extinguishment of appurtenant easements which run with that land. The holder of an easement is entitled to damages when the easement is taken or damaged for public use. [Citation.]” (*County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1279.) Just as the easements burdening the “toothpick” were extinguished by its condemnation, the easements benefiting the “toothpick” were similarly extinguished by its condemnation. Insofar as the “toothpick” was benefited by reciprocal easements appurtenant to other parcels in the center, the value of those easements to TPSC LP were included in the value of the “toothpick.” TPSC LP was entitled to no more than compensation for the market value of the “toothpick.”

TPSC LP’s partial ownership of Sneath and TPSC LLC is *not* an interest in the remainder property and does not allow it to “double dip.” Sneath and TPSC LLC were awarded severance damages for the injuries caused by the condemnation to their interests in the remainder. Separate and additional recovery by TPSC LP for the same injury because of its ownership in these business entities would constitute a double recovery. TPSC LP is no more entitled to *additional* compensation by virtue of its ownership interest in these two companies, than would be any other Sneath or TPSC LLC owner or shareholder.

We have previously concluded that substantial evidence supports the trial court's determination that the larger parcel encompassed the entire shopping center, except for the "bone," and that the three unities were present. We have found no error in the court's finding of unity of title or ownership based upon the unified, integrated use of Tanforan in accordance with the REA in all of the circumstances presented. As the larger parcel is made up of all shopping center properties owned by Owners, the taking of any portion of the larger parcel subjects the remainder of the larger parcel to severance damages, if proved. Severance damages suffered by the "remainder" of the shopping center due to the loss of parking attributable to the take, and the consequent reduction of the parking ratio to less than that required by the REA and by the City, are recoverable *by parties with an interest in the remainder*. As we have stated, TPSC LP has no compensable interest in the remainder. A obligation or "debt" under the REA to put sums it receives as severance damages compensation toward replacement parking is simply not a compensable property interest in the remainder.

After condemnation of its entire interest in the "toothpick," TPSC LP had no property interest in the remainder, regardless of any "debt" it may have under the REA. TPSC LP was fully compensated for its loss by the award of \$462,080 in damages for the condemnation of its fee interest in the "toothpick." TPSC LP was erroneously awarded severance damages.

We recognize that to reduce severance damages by the \$710,390.60 awarded to TPSC LP results in a failure to make the Owners whole for the entire severance damages suffered by the larger parcel due to the take and constitutes a windfall to SamTrans.¹²

¹² Owners based their claims to severance damages primarily upon the impact the loss of parking would have upon the fair market value of the remainder, as measured by the cost of building a new parking garage (the cost a prospective purchaser would factor into the price it was willing to pay for the remainder). Owners sought to prove their severance damages case by showing the total value of the loss suffered by the remainder and asking the jury to allocate the loss among the various Owners according to the proportionate share of parking lost by each. The total jury award for severance damages suffered by the remainder and attributable to parking amounted to \$17,326,600. By

At our request, the parties have filed supplemental letter briefs addressing whether this court may “reallocate” the severance damages erroneously awarded to TPSC LP among the other Owners in the same proportion that severance damages were awarded to them by the jury. Not surprisingly, SamTrans argues that reallocation is not permitted, while Owners contend that it is.

SamTrans argues that reallocation amounts to an award of additional compensation to Owners and would operate as an additur without SamTrans’s consent or the alternative of a new trial in violation of SamTrans’s right to a jury trial on the issue of compensation. SamTrans also argues that reallocation is contrary to section 1260.220, subdivision (a), pursuant to which SamTrans elected to have the jury separately assess and compensate “the value of each [Owner’s] interest and the injury, if any, to the remainder of such interest” Finally, SamTrans contends that reallocation is beyond the scope and power of an appellate court and invades the province of the jury to determine compensation.¹³

knocking out the \$710,390.60 severance damage award to TPSC LP (approximately 4 percent of the total severance damages attributed to lost parking), SamTrans is relieved of the responsibility to pay \$710,390.60 of the total severance damages awarded by the jury and the remainder has suffered uncompensated severance damages in that amount. Consequently, the remaining Owners have failed to receive full compensation for their severance damages.

¹³ At oral argument, SamTrans also argued that *D.R. Horton, supra*, 126 Cal.App.4th 668, 684-685, precludes this court from “reconciling” the allegedly inconsistent special verdicts. In *D.R. Horton*, the appellate court affirmed the trial court’s grant of a new trial on the ground that the jury’s finding on the fair market value of the part taken was derived from a figure of \$445,000 per net developable acre and its award of severance damages was derived from a value of \$850,000 per net developable acre and that the “jury’s findings as to these components were internally inconsistent and thus against law.” (*Id.* at p. 673.) In so ruling, the appellate court recognized that the “rule of reconciliation” applicable to reconciliation of general and special verdicts “does not apply to inconsistencies between questions in a special verdict because . . . ‘there is no such presumption in favor of upholding a special verdict.’” [Citations.]” (*Id.* at p. 679.)

Here, however, we do not seek to reconcile inconsistent special verdicts as there is no inconsistency in the special verdict. Consequently, *D.R. Horton* does not support SamTrans’s argument.

Like the Supreme Court, the Court of Appeal is given broad powers in the disposition of appeals. (§ 43.) We may affirm, reverse, or *modify* the appealed judgment or order and direct the proper judgment or order to be entered on remand. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2005) ¶¶ 11:48, 11:53, pp. 11-15, 11-16 to 11-17; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 744, 749, pp. 773, 777-778; *id.*, (2006 supp.) § 744, p. 226.) “Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination. [Citations.]” (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1170.) There is no question that this court has the power to modify the judgment in an appropriate situation. As the Supreme Court recognized more than a century ago: “Under its authority to modify *any judgment or order appealed from*, whenever it is shown, either by the record on appeal, or by the admission or consent of the parties, that their rights can be finally determined here, this court will render its own judgment to that effect, or will direct such action in the court below as in its opinion will best conserve the rights of the parties to the action, without subjecting them to further delay or expense.” (*Fox v. Hale & Norcross S.M. Co.* (1898) 122 Cal. 219, 221-222 (*Fox*), italics added; see 9 Witkin, Cal. Procedure, *supra*, § 744, p. 773.) This power is not limited to cases in any particular context, but, as observed by our Supreme Court, relates to “any judgment or order appealed from” (*Fox*, at p. 221.)

The real question presented here is whether the “record is sufficiently definite” (*Sagadin v. Ripper, supra*, 175 Cal.App.3d at p. 1170) to allow us to modify the verdict, rather than to require remand to the trial court to allow a new jury to retry the issues relating to allocation of the severance damages among the Owners. We believe that it is.

As has been recognized in the tort context, special verdicts may often provide the “perfect vehicle in the record to serve as a basis for modifying the judgment.” (*Sagadin v. Ripper, supra*, 175 Cal.App.3d at p. 1171 [special verdicts assessed comparative fault and percentages of fault of all parties, allowing appellate court to calculate and reallocate

damages as if there had been no error]; *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 334, fn. 6 [“Certainly when explicit findings as to the comparative fault of multiple defendants have already been made in the trial court . . . it presents no undue burden to permit such findings to be utilized as a basis for the allocation of liability among the defendants”].) Here, of course, the jury’s allocation of parking severance damages among Owners did not involve any issue of proportionate fault. Rather, the allocation related to each Owner’s injury and its proportionate share of the severance damages award. Nonetheless, the principle is precisely the same.

We see no compelling reason that the special verdicts rendered here may not similarly guide this court in reallocating the severance damages award after TPSC LP has been eliminated from the mix. Nor do we think it unduly speculative for us to do so. SamTrans elected to proceed in a single stage, rather than a two-stage proceeding, thereby asking the jury to separately assess “the value of each interest”; “the injury, if any to the remainder of such interest”; and “the compensation awarded therefor.”

(§ 1260.220, subd. (a).) The jury arrived at its verdict in a single stage proceeding and awarded damages to each Owner as set forth in the special verdicts. SamTrans’s counsel did argue that identifying the amount of severance damages attributable to parking loss was “an issue that is important to defendants, but not to [SamTrans],” but conceded that the jury could “break this [diminution in value] out and attribute some of it to parking losses or whatever.” The jury did so and it is clear that the jury arrived at its parking severance damages award in much the same manner that the parties’ experts arrived at their calculations relating to parking severance damages—that is, by determining the entire severance damages suffered by the remainder parcel attributable to the reduction in parking, and allocating that amount among the Owners.

SamTrans and the Owners disagreed about how many parking spaces were actually lost, what parking ratio was required to be maintained by the center as a whole in order to satisfy legal requirements and market demands, and how much restoration of the spaces would cost. They did not disagree that determination of the total number of spaces required to be replaced, followed by a determination of each Owner’s

proportionate share in the total, was an appropriate method for calculating severance damages. For example, SamTrans's expert Talmage testified that to arrive at his cost-to-cure the parking deficit severance damage allocations to Sears, TPSC LLC and Target, he first determined the total cost to build the replacement garage, then allocated that cost among these three Owners in proportion to the number of spaces lost by each compared with 536 (the total number of spaces he calculated were lost by the trio), and then multiplied the percentage he had calculated for each by the total cost of the garage. He then adjusted his figures to account for new operating expenses, delay in construction, inflation, and poaching.

Owners argue that the jury "obviously" determined total parking severance damages before reaching the allocation issue, relying in part upon a purported question from the jury during deliberations as to whether it had to allocate total parking severance damages according to the percentages provided by Owners and the judge's purported response that the jury could allocate in any manner it found reasonable under the evidence.¹⁴ Neither the question nor the response was reported and neither appear directly in the record. Even without this evidence of the jury's question and the court's response regarding allocation of severance damages, it seems clear on this record that the jury arrived at its total parking severance damages and then allocated that amount among the Owners.

¹⁴ Owners' posttrial letter and a declaration of counsel regarding these "facts" were countered by SamTrans's counsel's somewhat artful declaration that she "disagree[d]" with Owners' counsel's recollection of the jury question and that she did not recall any jury question being posed on November 26th. However, at the hearing on SamTrans's new trial motion, two of Owners' counsel represented to the court that the question of allocation had been raised by the jury and discussed by counsel and that the court had instructed the jury in accordance with SamTrans's proposal that the jury could allocate severance damages in any manner it found reasonable under the evidence. *SamTrans's counsel did not refute that representation*, although she successfully objected to any speculation based upon posttrial interviews with jurors. The court did not indicate whether it recalled the question and instruction. Neither did it disagree with Owners' counsel's representation. There is no indication why the parties did not seek to settle the record on this point in connection with this appeal. (Cal. Rules of Court, rule 4(g).)

The special verdict here provides the “perfect vehicle in the record to serve as a basis for modifying the judgment.” (*Sagadin v. Ripper*, *supra*, 175 Cal.App.3d at p. 1171.) The jury allocated the severance damages attributable to parking loss as follows: \$346,532 to TPSC LLC; \$9,096,465 to Sears; \$7,173,212.40 to Target/Sneath; and \$710,390.60 to TPSC LP. The jury therefore must have determined that total parking loss severance damages amounted to \$17,326,600. We have concluded that TPSC LP was not entitled to severance damages, as after the take, it had no property interest in the remainder. Consequently, reallocating the \$710,390.60 erroneously awarded to TPSC LP for parking severance damages to the remaining Owners in proportion to the allocation made by the jury to each results in reallocation to TPSC LLC of \$14,918.21 (2.10 percent) for a parking severance damage award of \$361,450.21; to Sears of \$388,867.81 (54.74 percent) for a parking severance damage award of \$9,485,332.81; and to Target/Sneath of \$306,604.58 (43.16 percent) for a parking severance damage award of \$7,479,816.98.

Such reallocation is consistent with the fundamental principle of awarding just compensation for property taken for public use and avoids the unfairness of allowing SamTrans to reap a windfall from the erroneous allocation of severance damages to TPSC LP.

III. Owners’ Appraisal Methodologies in Valuing Severance Damages

SamTrans attacks the underlying valuation methodology used by Owners’ severance damages appraisal expert Betts on numerous grounds, contending the testimony was fatally flawed. Specifically, SamTrans contends that Betts’s use of “cost-to-cure” in lieu of one of the traditional three approaches to market value to measure severance damages was reversible error; that Betts failed to value the property in its before and after condition, as required by case law; and that Carneghi and Betts, the two experts used by Owners to value the take and severance damages, used inconsistent factors to value the take and damage to the remainder.

A. Standard of Review

SamTrans positions its challenge to the valuation methodology used by Betts as a question of law, subject to our de novo review.¹⁵ However, we are persuaded that the appropriate standard of review is whether the trial court abused its discretion in admitting Betts's evidence. The trial court's admission or rejection of an expert's valuation testimony is reviewed under the abuse of discretion standard. (*Rancho Penasquitos*, *supra*, 105 Cal.App.4th at p. 1027; accord, *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1073.) "In condemnation proceedings, the trial court is vested with considerable judicial discretion in admitting or rejecting evidence of value. [Citation.]" (*Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, p. 86 & fn. 6.) "Under this standard, we will not reverse a trial court's ruling if it was 'based on a "reasoned judgment" and complies with . . . " . . . legal principles and policies appropriate to the particular matter at issue." [Citations.]' [Citation.] Rather, we will only overturn the court's decision if it ' "exceeds the bounds of reason, all of the circumstances before it being considered." ' [Citation.]" (*Rancho Penasquitos*, at p. 1027.) "Where it appears that the opinion of a valuation witness is based upon considerations which are proper as well as those which are not, the testimony *may be* admitted and the trier of fact shall determine its weight and credibility." (*Ventura County Flood Control Dist. v. Security First Nat. Bank* (1971) 15 Cal.App.3d 996, 1004, italics added, citing *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 Cal.App.2d 889, 902 (*Sweet*).)

¹⁵ We note that for the most part SamTrans cites tax appraisal cases, not condemnation cases, in support of de novo review. (See *Huson v. County of Ventura* (2000) 80 Cal.App.4th 1131, 1134; *Service America Corp. v. County of San Diego* (1993) 15 Cal.App.4th 1232, 1235; *County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1122.) The condemnation case cited by SamTrans, *Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 Cal.App.3d 58, 65-66 (*Goehring*), does not stand for the proposition that de novo review applies to the issue of the appropriateness of the method used by the appraiser. There, the court found that the testimony as to value was based entirely on inappropriate matter and should have been excluded in its entirety. (*Id.* at p. 64.)

B. Expert Testimony

Owners retained Carneghi to value the larger parcel in its “before” condition and the take property (including easements). Carneghi recognized that most of the take parcels were used for parking in conjunction with the shopping center. At trial, Carneghi testified to the market value of the larger parcel before the take and to the value of the take property, using a comparable sales approach. He did not opine on severance damages. Using the comparable sales approach, and adjusting for differences in the subject property, Carneghi valued the larger parcel of the shopping center before the take at \$128,285,430 (\$130 per square foot multiplied by the total GLA of the center). Valuing the larger parcel as a unified whole (whether improved with buildings or parking), Carneghi arrived at a value of \$35 per square foot for the land taken, and added the value of easements and improvements (such as shrubs and asphalt) taken, to arrive at his estimate of value for the take property. Carneghi valued the property based upon his determination that the highest and best use of the property was to continue as a shopping center. He did not assume that the GLA of the shopping center would expand or that the center would be redeveloped, but based his valuation on the existing center.

Betts provided expert testimony as to severance damages suffered by the remainder after the take. Carneghi and Betts did not cooperate in arriving at their respective valuations. Although the use of one appraiser to estimate the value of the take and another to value severance damages was unusual, there was no claim that such a practice was unethical or inappropriate.

Although they did not collaborate, Betts did rely on portions of Carneghi’s analysis in several respects: Among other things, he agreed with Carneghi’s valuation analysis of the larger parcel in its before condition as \$128,285,430.¹⁶

¹⁶ Betts testified he got the number from Carneghi’s valuation statement, that he did an independent evaluation of the entire center in its before condition by looking at Carneghi’s comparable sales data. Betts did his own analysis and concluded that “my number was basically the same as his number”

Betts testified that there were many types of severance damages, but that in general they could be categorized as either the “cost to cure [as] a measure of the loss in market value of the property,” or the diminution in value measured by sales in the marketplace. He further testified that in doing an eminent domain appraisal one had to look at the property in both the before and after condition, and that the highest and best use of a property could be the continued use of a given piece of real estate in its current condition, expanded use for the same purpose, or a change of use. He opined that the highest and best use of Tanforan was to continue as a shopping center, but to be redeveloped to an expanded GLA from the current 986,000 square feet to 1,899,000 square feet of GLA.

Betts opined that the remainder suffered total severance damages of \$39,175,600. He testified that his severance damage estimation included two components: The first was damages to the remainder attributable to the loss of parking (\$23,078,000 for the cost of a replacement parking structure, \$6,780,000 increased operating and maintenance costs attributable to the replacement parking, and \$267,600 for the temporary loss of parking during construction of the replacement parking structure.) The second component of Betts’s severance damages estimate was the loss of expansion potential of approximately 328,700 square feet of GLA (valued at \$9,050,000).

On cross-examination, Betts testified that he arrived at his exact numbers by adding up each of the various severance damages, but that he “check[ed] it against the market” using Carneghi’s comparable sales data. In Betts’s opinion, part of the diminution in the property value was attributable to the “cost to cure” the parking loss, which “would be corrected before you compared it to the market sales, otherwise you have an apple and orange comparison.”

With respect to parking loss, Betts testified that for a shopping center the size of Tanforan, the minimal recommended parking ratio is 4.5 to 5 parking spaces per 1,000 square feet. Such a ratio is needed for customers to be able to get to the store. For every space that is lost, some value is lost. He calculated that as a result of the project, 1,128 parking spaces were lost. He relied upon the calculations of Dan Smith, a traffic engineer

in arriving at this figure. The parking ratio at Tanforan before the take was 4.94 per 1,000 square feet and such ratio was required by the REA.

Betts used a “cost-to-cure” method to arrive at his figures for severance damages due to parking loss. He testified that the “cost-to-cure” method was an appropriate and acceptable methodology for an appraiser to use in valuing severance losses in the circumstances presented. *Betts related the cost-to-cure approach for valuing the severance loss to the diminution in value of the property the market would recognize.* He stated that use of cost-to-cure approach was necessary in this case “because first you have to replace the parking, otherwise you are in violation of the code. Second by far the best measure of something that is going to cost you money is to estimate what it is going to cost you, because that is how the market is going to do it. Whenever the market expects to spend money, they get an estimate.” Betts analogized to a homebuyer, opining that a buyer would want to know what the cost to fix the property would be and would deduct the cost to cure the damage from what the buyer was willing to pay for the property. Betts testified that in the marketplace, the shopping center buyer would look at the cost of replacing the lost parking attributable to the project, stating, “They simply have no choice, both for economic . . . and legal grounds, they must replace the parking.”

Betts also explained that he believed he could not use the comparable sales approach to value the parking loss because there were no sales of shopping centers with parking ratios “way below the required code in its parking, and such a beast does not exist, because they have to have the parking to survive.” Betts was able to use the income approach to measure diminution in value attributable to the increased operating and maintenance expense of a replacement parking structure, but not for the replacement structure itself because without the replacement parking “you don’t meet code. When these spaces are lost, you have to build a garage, you have to bring it back up to the code.”

Betts testified that he had used the *same* highest and best use—that of an expanded center—to calculate all of his severance damages. However, he also testified that whether or not Tanforan was expanded to what he viewed as its highest and best use, one

would “have to build that replacement parking, period.” On cross-examination and on redirect-examination, he reiterated that his estimate of severance damages for lost parking was “completely independent of any expansion.” On redirect-examination, he testified once again that his estimate of severance damages due to loss of parking (including the replacement structure, increased operating and maintenance costs, and the temporary loss of parking) had “nothing to do with the expansion,” that it “has to do with the existing center, the need to park the existing center according to the law, according to market demand and according to the REA. Those are the three things that drive the need to replace that parking, the necessity of replacing it.” He affirmed that his estimate of parking loss severance damages was not adjusted for whether the center might be expanded in the future.

C. Testimony as To Property in Before and After Condition

SamTrans contends that Betts offered no testimony regarding the value of the property in either its *before* or *after* condition and that omission constitutes reversible error. We disagree.

We reject SamTrans’s claim that Betts failed to value the property in its before condition. Betts testified he adopted Carneghi’s valuation of the property in its before condition, that he used Carneghi’s comparable sales data, and agreed with the values Carneghi had reached. This was acceptable. (Evid. Code, § 814 [witness may base an opinion as to the value of property “on matter . . . made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property . . .”].)

We also reject the contention that Betts failed to testify as to the market value of the remainder following the severance—its *after* condition. Betts opined in his amended valuation statement that the value of the “larger parcel” in the “before condition” was \$128,285,430 (as set forth in Carneghi’s revised statements), and the value of the remainder parcel in the “after condition” is \$80,523,333. Moreover, Betts testified to his opinion that the market value of the remainder declined \$39 million dollars, in part because the buyer would have to build a parking garage.

Moreover, as discussed above, California law allows severance damages to “ ‘be shown by proving the market value of the remainder before and after the taking and leaving the computation of the difference to the jury, *or by competent evidence of severance damages in a lump sum. . . .*’ (*People v. Ricciardi*, *supra*, 23 Cal.2d 390, 401; *Pacific Gas & Elec. Co. v. Hufford* [(1957)] 49 Cal.2d 545, 555; *People v. Hayward Bldg. Materials Co.*, *supra*, 213 Cal.App.2d 457, 464-465.)” (*Sweet*, *supra*, 255 Cal.App.2d 899, 904, italics added.) The court did not err in allowing Betts to testify that the diminution in market value was equivalent to the cost to cure the parking loss plus the lost development rights, if such testimony was not otherwise prohibited.

D. Violation of the “Consistent Use” Principle

SamTrans contends that Carneghi and Betts used inconsistent factors to value the take and severance damages to the remainder. Carneghi testified that his opinion of valuation of the larger parcel in its before condition (at \$35.00 per square foot for the entire property) and his valuation of the take property were based upon the highest and best use of the center as continuing to be used as a 986,811-square-foot-GLA shopping center and that these valuations were not based upon any assumptions that the center could or would expand. Betts testified that the highest and best use of the shopping center was as an expanded 1.9 million square foot of GLA. Severance damages may properly be awarded for the loss of development or expansion potential of the remainder where “the loss of that potential could be shown to affect the property’s present fair market value.” (*Cushman*, *supra*, 53 Cal.App.4th at p. 928 [severance damages allowed for inability to fully expand existing retail use on the remainder because of reduction in number of parking spaces due to the taking]; accord, *Neumann*, *supra*, 6 Cal.4th at pp. 747-749, 756 [marketplace realities dictate recognition that “future use may affect the present value of real property”].)

It is arguable that the highest and best use scenarios presented by the Owners’ two appraisers were fundamentally inconsistent. However, Carneghi did not foreclose the possibility that a buyer might wish to redevelop and expand the center GLA, and Betts explained on rebuttal that Carneghi did not need to look at the probability of expansion to

value the take property, while he (Betts) had looked carefully at this issue to arrive at his opinion on severance damages. Moreover, despite Carneghi's testimony that he did not consider the issue of expansion, Betts stated that he understood that the probability of expansion was "basically present in Mr. Carneghi's value." Nevertheless, we have concluded for other reasons that the award of severance damages for both the loss of surface parking and for loss of development rights in this case violated the "consistent use" principle of *Harcros Pigments, supra*, 101 Cal.App.4th at pages 1110-1111, as the same property cannot be devoted simultaneously to new buildings and surface parking in the before condition.

Harcros Pigments, supra, 101 Cal.App.4th 1083, held the trial court erred in allowing compensation for fixtures and equipment situated on the condemned property (a chemically contaminated manufacturing site) where there was no dispute that the highest and best use of the condemned property was for mixed commercial use. (*Id.* at p. 1104.) According to the appellate court: "We believe any recovery exceeding the salvage value of the equipment violated the principle of 'consistent use'" (*Id.* at p. 1110.) "Although we know of no case so stating, we have little doubt that California law incorporates the principle of 'consistent use,' i.e., 'that land cannot be valued based on one use while improvements are valued based on another.' (Appraisal Institute, *The Appraisal of Real Estate* (12th ed. 2001), p. 324; see *Spano v. State of New York* (1964) 22 A.D.2d 757 [253 N.Y.S.2d 730] ['It was error . . . to award anything for the value of the buildings while at the same time fixing the land value for commercial usage since the two bases are entirely inconsistent'].) Thus a landowner cannot recover compensation based on a use more valuable than the existing one while simultaneously claiming recovery under section 1263.210(a) for existing improvements that are incompatible with that use. This principle would seem inherent in the Law Review Commission's recognition that improvements can 'decrease the value of the property below its unimproved condition.' (Cal. Law Revision Com. com., 19A West's Ann. Code Civ. Proc., *supra*, foll. § 1263.210, p. 26; see also 1 Matteoni & Veit, *Condemnation Practice in Cal.* (Cont.Ed.Bar 2d ed. through June 2002 update) § 4.18, p. 109 ['Often, when

property is ready for immediate development, the presence of older improvements may actually reduce the property's value because of the cost of removal.']; 2 Smith et al., Cal. Civil Practice Real Property Litigation (1994) § 15:92, p. 115.)" (*Harcros Pigments*, at pp. 1110-1111, fn. omitted.)

SamTrans argues that Betts's conclusion on severance damages was based upon his determination that the highest and best use of the shopping center "before" the take was, in the near term, to expand to 1.9 million square feet of GLA within the confines of the existing property boundaries. This highest and best use assumed that Tanforan would be redeveloped and converted to a more intensified use by attracting an additional anchor tenant or tenants, redeveloping and adding inline mall space, additional parking, hotels, and so forth. SamTrans contends that Betts's testimony regarding the parking loss severance damages (equivalent to the cost to construct a replacement parking garage, and its attendant operating and maintenance costs) "is based on the need for SamTrans to pay for replacing *surface* parking lost in those same take areas" that Betts slated for other improvements, including an additional parking garage.

Owners counter that they sought "two entirely different categories of severance damages. In the *after* condition, the Center had less parking than before, and [Owners] had to replace it on a portion of the *remaining* site, because there was no other available land. The market value of the Center decreased by the same amount required to replace that parking. Without the take, there would have been no reason to build replacement parking at all. [¶] But, as a result of the take, Tanforan could not expand in the same way it could have before, because the loss of land constrained both the location and amount of available new retail space. Betts concluded Tanforan's value decreased because of this loss of land in the after condition, which prevented a maximum build-out." Owners insist that these are two distinct ways in which Tanforan suffered damages and that these two measures "are *not* inconsistent, and they are *not* based on differing definitions of the larger parcel." Owners characterize the ruling in *Harcros Pigments*, *supra*, 101 Cal.App.4th 1083, relating to inconsistent use, as "narrow" and having "nothing to do with severance damages." Rather, Owners contend the *Harcros Pigments* court

simply reached the logical conclusion that a party could not, at the same time, receive a higher land value based on a future more intense use of the property taken *and* be paid for existing improvements on the property that would need to be demolished to achieve such a higher, more valuable use. (*Id.* at pp. 1110-1111.) We disagree with Owners' view of *Harcros Pigments* as being limited to issues solely involving the take property.

Moreover, although less obvious than was the case in *Harcros Pigments, supra*, 101 Cal.App.4th 1083, we believe the same type of error was made here. In testifying about the loss in expansion potential as an element of severance damages, Betts's testimony as to the highest and best use of the property in its before condition and his exhibits displaying various scenarios for expanded development consistently showed construction of improvements—notably parking garages—on the property taken for the BART station and related infrastructure. Exhibits admitted into evidence to illustrate Betts's testimony about the loss in expansion potential show an expanded parking facility dominating the take property. One exhibit even shows a BART station overlay on top of a proposed future parking garage under an expanded highest and best use scenario. Owners sought and received severance damages for the loss of surface parking spaces. The evidence presented to the jury in support of the loss of expansion potential category of severance damages demonstrated that, absent the BART development, the area used for surface parking in the existing center probably would have been redeveloped to achieve the highest and best use of an expanded center envisioned by Betts.

Although theoretically, loss of parking spaces and loss of expansion potential might be separate and not incompatible components of severance damages, as presented to the jury in this case, they literally covered much of the same ground. We conclude that the award of severance damages for both the loss of parking and for the loss of development potential in this case violated the consistent use principles of *Harcros Pigments, supra*, 101 Cal.App.4th at pages 1110-1111.

SamTrans urges that such error requires reversal not only of the portion of the severance damages awarded for loss of expansion capability, but also for loss of parking. It reasons that “because under Betts’[s] before condition, the owners would not have

devoted the take areas to surface parking use but rather would have constructed parking garages, hotels and new stores on these areas, then the loss of these areas for surface parking is not chargeable to SamTrans.” We agree that the uses were inconsistent; however, we see no need to attribute the inconsistency to the severance damages for the loss of surface parking rather than for the loss of expansion potential. Betts did *not* tie the severance damages attributable to a loss of parking to the expanded shopping center highest and best use. Rather, he expressly testified that the market would require that a buyer replace the parking spaces lost to the BART development *whether or not* the center was expanded past its existing GLA.

Moreover, the jury’s special verdict identified the portion each Owner’s severance damages award attributable to parking loss. The sum identified as parking loss severance damages amounted to \$17,326,600, leaving \$2 million of the award that could be attributed to loss of development rights.

Consequently, reversal is required only for that portion of the severance damages award *not* attributable to parking loss.

We turn to SamTrans’s challenge to the severance damages award for parking loss.¹⁷

E. Severance Damages for Parking Loss

1. “Cost to Cure”

SamTrans contends that Betts’s use of the “cost-to-cure” method to arrive at his opinion of severance damages attributable to the loss of parking was improper as a

¹⁷ We need not address SamTrans’s additional claims of error relating to severance damages awarded for lost development rights. They include claims that Betts’s testimony that the highest and best use of the property in the before condition was without proper foundation demonstrating that expansion to 1.9 million square feet GLA was legally, economically or physically feasible; that an undisclosed expert, architect Gary Dempster, was allowed to opine on the feasibility of expansion plans; that the award of damages for lost development rights was contrary to law and unsupported by substantial evidence; and that the court erred in allowing into evidence specific development plans for the center upon which Betts had not relied.

measure of damages without reference to the loss in fair market value of the property taken or damaged. It further argues that Betts's cost-to-cure approach violated a requirement that severance damages be derived from one of the three traditional approaches to market value, "the appraisal trinity" of comparable sales, cost,¹⁸ or income approach.

The cost to cure is the "cost of restoring the injured remainder to the same relative position in which it stood before the public project was begun" (1 Matteoni & Veit, *Condemnation Practice in Cal.* (Cont.Ed.Bar 3d ed. 2005) § 5.14, p. 251 (hereafter Matteoni & Veit).) Betts conceded he had not used any of the three classic approaches to value in arriving at his opinion of market value of the remainder in the after condition.¹⁹ Asked under what conditions the market could measure "cost to cure" as a diminution of market value, Betts responded: "In my experience I find that the market uses the cost [to cure] as the measure of the market diminution when something legally must be done or economically must be done or must be done to maintain the market position of the property. Those are the compelling issues. It's when the market is going to do the specific work that is being cost that's when [we] see the market take the hit." He testified these factors were present at Tanforan and included the need to correct the "code deficiency parking"; the need to "meet the agreement of the REA"; and the need to provide the parking that "the tenants expect in order to be able to get good tenants in

¹⁸ The "cost" approach differs significantly from "cost to cure." The "cost" approach is more correctly referred to as the reproduction cost or the replacement cost, less depreciation. It is derived from calculating the cost of reproducing the improvements in a new condition and reducing the value for depreciation. (Evid. Code, § 820.)

¹⁹ Called as a rebuttal witness to SamTrans's expert Talmage, Betts agreed that the cost to cure could not exceed the diminution in the value of the remainder property caused by the take. However, he opined that, "This is a circumstance where there is no direct market evidence of the diminution through sales, for example. . . ." He stated he had "used a market approach to determine what the market diminution is and I did that by looking at whether market participants would conclude it was necessary to spend this money or not. Once I conclude that that is what the market is obliged to do, then I use the full cost to cure."

here. If you don't have the parking, you won't get the tenants. The rent will go down and you suffer another type of severance. So you have to get the parking."

Betts adequately supported his use of the cost-to-cure methodology in these circumstances, tying it directly to the market value of the property in its after condition. Market value is the touchstone of the calculation of damages in an eminent domain action—not the method used to calculate market value.

The eminent domain statutes reject the rigid application of the appraisal trinity approach to market value as urged by SamTrans.

Section 1263.320, subdivision (a), defines market value. (See *ante*, pt. I.A., pp. 8-9.) Subdivision (b) of that section provides: "The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable."

The Legislative Committee comment to the 1975 amendment to section 1263.320 recognizes that, as provided in the Evidence Code, "regardless of whether there is a relevant market for property, its fair market value may be determined by reference to matters of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property including where appropriate, *but not limited to*, (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula." (Legis. Com. com., 19A West's Ann. Code Civ. Proc., *supra*, foll. § 1263.320, p. 39, italics added.)

Evidence Code section 814 provides: "The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, *including but not limited to the matters listed in Sections 815 to 821, inclusive*, unless a witness is precluded by law from using such matter as a basis for an opinion." (Italics added.) The Legislative Committee comment to the 1975 amendment of section 814 states in pertinent part: "Within the limits of this article, fair market value may be determined by reference to matters of a

type that reasonably may be relied upon by an expert in forming an opinion as to the value of property *including, but not limited to*, (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula.” (Legis. Com. com., 29B pt. 3 West’s Ann. Evid. Code (1995 ed.) foll. § 814, p. 116, italics added.) The Legislative Committee Comment to the 1980 amendment to Evidence Code section 814 further emphasized: “While the value of property may be determined by reference to matters listed in Sections 815 to 821 where appropriate, an opinion as to value may also be based on any other matter that satisfies the general requirements of Section 814. [Citations.]” (*Ibid.*)

Cost-to-cure is a recognized method for estimating the loss in market value of the remainder.

“The most common method of estimating severance damages is to determine the extent to which the remainder has decreased in value. . . . [¶] The comparison between before and after values is not always a conclusive means of measuring severance damages; special circumstances may render it inapplicable. [Citations.]” (1 Matteoni & Veit, *supra*, § 5.12, p. 249.) “Although severance damages must always be related to changes in market value, it is permissible to testify regarding severance damages as a lump sum rather than presenting the before and after market values, with the severance damages being the difference.” (14 Dankert, Cal. Real Estate Law & Practice, *supra*, § 508.10[2], p. 508-12, fn. omitted; accord, *People v. Ricciardi*, *supra*, 23 Cal.2d at p. 401.)

Case authority also supports admission of valuation testimony using an approach other than that of comparable sales, cost, or income, so long as the approach is tethered to market value and the diminution in value of the remainder.

In *Sweet*, *supra*, 255 Cal.App.2d 889, the court rejected the agency’s complaint that the owner’s valuation witnesses “failed to observe the proper rules for determining severance damages in that they failed to testify to the value of the larger parcel in the after condition.” (*Id.* at p. 904.) *Sweet* recognized that “it is the rule in California that severance damages ‘may be shown by proving the market value of the remainder before

and after the taking and leaving the computation of the difference to the jury, *or by competent evidence of severance damages in a lump sum. . . .*' (*People v. Ricciardi, supra*, 23 Cal.2d 390, 401; *Pacific Gas & Elec. Co. v. Hufford, supra*, 49 Cal.2d 545, 555; [*Hayward Bldg. Materials*], *supra*, 213 Cal.App.2d 457, 464-465.)" (*Sweet*, at p. 904, italics added.) Consequently, *Sweet* held it was "permissible for defendant's valuation witnesses to show, as they did, the loss or depreciation in the market value of the property after the take by testifying to severance damage in a lump sum. There was no impropriety in their so doing. ([*Hayward Bldg. Materials*, at pp. 464-465]; *Pacific Gas & Elec. Co. v. Hufford, supra*, at pp. 554-555.)" (*Sweet*, at pp. 904-905.)

"When use of the diminution-in-value test fails to reflect accurately the extent of loss, severance damages may be measured by the cost of restoring the injured remainder to the same relative position in which it stood before the public project was begun; this is known as the cost-to-cure method. [(*Hayward Bldg. Materials, supra*, 213 Cal.App.2d] 457 (cost to cure measured by, e.g., costs of paving reconstruction, dismantling old shop, relocation of electric lines, spur track); *City of Riverside v. Kraft* (1962) 203 [Cal.App.2d] 300 (cost to cure measured by cost of relocating shrubs, trees, and flowers necessitated by moving of houses on land not taken).]" (1 Matteoni & Veit, *supra*, § 5.14, p. 251.)

In *Ventura County Flood Control Dist. v. Security First Nat. Bank, supra*, 15 Cal.App.3d 996, the district condemned a portion of a lemon ranch containing a row of large trees which served as a windbreak. The appellate court approved the award of severance damages for both the cost of replacing the windbreak and for the decreased productivity of the ranch during the 10 years required to grow a new windbreak. (*Id.* at pp. 1002-1004.) Evidence was presented that the reduction in probable income from operating the ranch without the windbreak would be a factor considered by an informed buyer in determining the fair market value of the ranch. (*Id.* at pp. 1002-1003.)

Importantly, it is established that the use of cost to cure must be tethered to market value. "The cost-to-cure method can be used only with reference to the loss in fair market value of the property damaged; *i.e.*, it is not a separate, unrelated measurement of damages but merely evidence of loss of market value. [Citation.]" (1 Matteoni & Veit,

supra, § 5.14, p. 251.) The cost to cure may be considered by the trier of fact as evidence of the decrease in market value and hence as evidence in support of the expert's opinion of severance damages. (*Hayward Bldg. Materials, supra*, 213 Cal.App.2d at p. 467.)

“Furthermore, this method is available only when evidence suggests that the cost of restoration does not exceed the decrease in market value of the property; *i.e.*, the jury must award the cost of restoration as severance damages if the amount is less than the decrease in market value. [Citations.]” (1 Matteoni & Veit, *supra*, § 5.14, p. 251, citing *People ex rel. Dept. of Public Works v. Flintkote Co.* (1968) 264 Cal.App.2d 97, 106; *Hayward Bldg. Materials, supra*, 213 Cal.App.2d 457.) Typically, the agency will introduce evidence of the cost to cure to demonstrate that such is less than the decrease in market value of the property shown by the owner. (See *Hayward Bldg. Materials*, at pp. 465-466.) However, nothing precludes owners from presenting cost-to-cure evidence as evidence of fair market value. (See *Ventura County Flood Control Dist. v. Security First Nat. Bank, supra*, 15 Cal.App.3d at pp. 1002-1004.)

SamTrans argues that Betts's cost-to-cure analysis violated these requirements. It maintains that Owners presented no evidence of the market value of the remainder in its *after* condition. Consequently, there was no evidence that the cost to cure did not exceed the decrease in market value to the remainder caused by the taking. This argument is somewhat circular. If cost to cure is appropriate as evidence of diminution in market value “[w]hen use of the diminution-in-value test fails to reflect accurately the extent of loss” (1 Matteoni & Veit, *supra*, § 5.14, p. 251), then requiring a comparison of before and after values before admission of cost-to-cure evidence makes little sense. In any event, Betts testified in effect that the cost to cure was *equivalent* to the diminution in market value of the remainder attributable to the parking loss, because prospective buyers would factor in the cost to replace the parking in determining what they would pay for the property. He expressly stated that in the present case, the cost to cure did not constitute a

“betterment”—that is, it did not exceed the decrease in market value of the remainder attributable to the project.²⁰

Cost to cure was never presented as a stand-alone measure of severance damages due to parking loss. It was admitted as evidence of diminution in market value of the remainder due to the severance.

We note that SamTrans’s appraisal expert Talmage also used cost to cure to measure severance damages, although he first testified to a comparison of the before and after values of the remainder using a reproduction cost less depreciation and a comparable sales approach and maintained that he used cost to cure as a “check” against his valuation of severance damages. (His cost to cure as evidence of severance damages was considerably less than Betts’s estimate.)

Betts explained why he believed each of the three approaches of the “appraisal trinity” would not provide a realistic measure of the loss in market value attributable to the parking loss—principally because there was no market for the remainder in its uncured *after* condition. Any prospective purchaser would necessarily reduce the price it was willing to pay for the shopping center by the cost it would incur in replacing the parking.

Goehring, supra, 13 Cal.App.3d 58, relied upon by SamTrans, is clearly distinguishable. There, the appellate court held it error to allow severance damages testimony as to the cost to cure where the testimony was unrelated to market value. (*Id.* at p. 66.) In *Goehring*, the district condemned land for a flood control project on a creek. No part of the newly constructed channel was on the owner’s land. The property owner was allowed to testify to the additional costs he estimated he would incur to install proposed pumping and drainage facilities in the property’s “after” condition, contrasted with its “before” condition. The appellate court recognized that “[w]hile cost of

²⁰ On rebuttal, he reiterated that he had “used a market approach to determine what the market diminution is and I did that by looking at whether market participants would conclude it was necessary to spend this money or not. Once I conclude that that is what the market is obliged to do, then I use the full cost to cure.

replacement or restoration of improvements (‘cost to cure’) may be relevant evidence on the issue of damages [citation], it is not a measure of damages to be separately assessed without reference to the loss in fair market value of the property taken or damaged.” (*Id.* at p. 65.) The court concluded it was error to allow the testimony where “there was no valid opinion evidence as to market value” (*Id.* at p. 66.) Commenting upon *Goehring*, one treatise opines: “The above problem will not arise with an experienced condemnation appraisal witness, who will invariably testify that the various items of severance damages considered are directly related to a decrease in the market value of the remaining portion of the larger parcel.” (14 Dankert, Cal. Real Estate Law & Practice, *supra*, § 508.10[2], p. 508-12.) This is precisely what Betts did.

SamTrans argues that use of a methodology other than the appraisal trinity to arrive at an opinion of market value is limited to special use properties such as schools, churches, cemeteries, parks, and utilities, for which there is no open market. (See *Redevelopment Agency v. Tobriner* (1989) 215 Cal.App.3d 1087, 1101-1102 (*Tobrer II*.) *Tobrer II*, upon which SamTrans relies, is distinguishable. There, the agency did not seek to condemn any fee interest, but condemned only nonexclusive easements for parking and ingress and egress held by owners of the Concord Park and Shop Center. (*Id.* at pp. 1090-1091) The property had been purchased by Levitz, a furniture company, however Levitz could not erect a structure because of reciprocal easements by other owners and the requirement that they give unanimous consent to Levitz’s building. The agency condemned the easements. The judgment found that the nonexclusive appurtenant easement rights were of no value and ordered nothing in compensation for the taking thereof by the agency. (*Ibid.*) The appellant owners argued that the trial court had unduly restricted their experts from basing their calculations of the value of the easements upon the *benefits* which might inure to the *servient land* (Levitz’s property) underlying the easements *as a result of the removal of the easements and the restrictions*. The appellate court affirmed the judgment of the trial court, holding it “did not err in adhering closely to the established standard for evaluating appurtenant easements.” (*Id.* at p. 1102.) On a prior appeal in the same case, the appellate court had ruled that the

“correct measure of damage for the taking of an appurtenant easement is the diminution in value of the dominant estate by the loss of the easement . . . ‘measured by a comparison of the fair market value of those parcels both before and after the taking.’ ” (*Tobriner II*, at p. 1092, quoting *Redevelopment Agency v. Tobriner* (1984) 153 Cal.App.3d 367, 378 (*Tobriner I*)). *Tobriner II* rejected the property owners’ argument that the easements were not susceptible of evaluation by the standard measures of fair market value because there was no relevant market for such easements. The *Tobriner II* court did state that the rule articulated in section 1263.320, subdivision (b), and Evidence Code section 823 (“the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable”) “is aimed at the evaluation of ‘special purpose properties’ such as schools, churches, cemeteries, parks, and utilities for which there is little or no market,” and that the property being evaluated (a shopping center) was not such a special use property. (*Id.* at p. 1102.) Consequently, not only were the property owners using a measure of damages that violated established rules for valuation of easements (*id.* at p. 1101), but they had “not provided any evidence that there is ‘no relevant market’ in these dominant tenements held in fee by the appellant owners. Sales and leases of properties in the Concord Center have apparently taken place on a regular basis both before and after the date of valuation.” (*Id.* at p. 1102.)

In the instant case, in contrast, the cost-to-cure evidence presented by Owners was aimed at showing the diminution in market value of the remainder property. There was no violation of any established rule for valuation. Here, too, Betts’s testimony provided evidence that there was no relevant market for shopping centers that had parking ratios far below code requirements—evidence that had been lacking in *Tobriner II*. Moreover, *Tobriner II*, *supra*, 215 Cal.App.3d 1087, 1091, affirmed the trial court’s determination to exclude the expert testimony. Here, the trial court allowed Betts to testify. In the circumstances presented, such determination was within the court’s discretion. (See *Escondido Union School Dist. v. Casa Suenos De Oro, Inc.* (2005) 129 Cal.App.4th 944, 984-985 (*Casa Suenos*) [deduction of costs of completing improvements from appraised

value as if they were completed was a legally sound methodology and appropriate under Evidence Code section 823]; *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership*, *supra*, 95 Cal.App.4th 1066, 1081-1084 [where evidence indicated there was no relevant, comparable market for automobile salvage business and method used by appraiser to value automobile salvage business was not proscribed by the law, whether specific circumstances of the business warranted application of the appraiser's methodology was a factual question for the jury].)

Even if Tanforan in its after condition did not constitute a “special use property,” Betts’s testimony regarding the cost-to-cure approach to estimate the decline in market value of the remainder attributable to the loss of parking was admissible, anchored as it was to market value and based upon his opinion that buyers would adjust the amount they were willing to pay for the center by the amount required to build adequate parking. The trial court did not err in allowing Betts’s testimony concerning the cost to cure the parking loss as a measure of diminution in market value.

2. Use of specific plans to measure cost of replacement garage

SamTrans contends that the trial court erred in allowing Owners to measure the cost of a replacement garage by a specific plan. It further argues that the replacement garage described in the plan was far more costly than required by the market. The trial court denied SamTrans’s motion in limine No. 31, to exclude replacement garage costs.

SamTrans relies upon cases acknowledging the general rule that “an owner may not prove damages by bringing in evidence that the taking will frustrate a ‘specific plan of development’ ” (*City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, 300 (*McCullough*); see *Harcros Pigments*, *supra*, 101 Cal.App.4th at p. 1103), arguing that the plans and cost estimates for the replacement garage admitted into evidence in support of the Owners’ cost-to-cure severance damages fall within the rule’s prohibition and were admitted solely to enhance severance damages. SamTrans cites cases acknowledging the general rule and its application to prohibit specific plans or maps of development where admitted to enhance damages *by showing frustration of the land owner’s development plans*. (E.g., *People v. Chevalier* (1959) 52 Cal.2d 299, 309 (*Chevalier*); *McCullough*, at

p. 300; *County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058-1059; *People ex rel. Dept. of Pub. Wks. v. Princess Park Estates, Inc.* (1969) 270 Cal.App.2d 876, 884-885 (*Princess Park*).

However, the general rule relied upon by SamTrans has no application to the use made by Owners of the specific plan and cost information for the replacement garage. Unlike the cases discussing application of the general prohibition and its exceptions, the plans and cost estimates for the replacement garage admitted here were *not admitted to show “frustration of a specific plan of development” of the Owners*. By its terms and purpose, the rule is aimed at assuring that damages are based on diminution in the market value of the property rather than upon the frustration of a specific development scheme of the property owner. The rule relates to the highest and best use of the property and not to the cost to cure as a evidence of severance damages recognized by the market. This becomes apparent both from the statement of the general rule and its exceptions and from the cited cases.

In *Sweet, supra*, 255 Cal.App.2d 889, the court stated the rule as follows: “Evidence of the owner’s plan of development is not admissible where its purpose is to show loss of profit or enhanced damages which would be suffered by being prevented from carrying out a particular scheme of improvement. [Citations.] Under certain restricted circumstances, however, the owner’s projected plan is admissible where the feasibility of the proposed use is a relevant consideration in determining market value. [Citations.] But evidence of value in terms of money which the land would bring for a specific use or under an owner’s projected plan of development is not admissible. [Citations.] Thus, the adaptability of part of a single parcel to a highest and best use differing from that to which other portions may be adaptable by reason of its distinctive character may be considered by a valuation witness on the theory that it is a factor which a knowing buyer would consider in determining the price he would pay for the whole. [Citation.]” (*Id.* at pp. 899-900.)

The cases describing the rule are illustrative. *Chevalier, supra*, 52 Cal.2d 299, approved the trial court’s refusal to admit an architect’s sketch showing that in the before

condition the property would be suitable for a motel and restaurant project and that the severance ruined the prospect of such development. The court acknowledged that “[i]t is true that evidence of a proposed use may be relevant, not to enhance damages but to show that the proposed use is feasible and, as such, might enter into a determination of the market value. [Citation.]” (*Id.* at p. 309.) However, where all the experts agreed that the land was valuable for such development before but not after the severance, “[i]t therefore appears that the sketch of a specific plan or development could have no other purpose than to attempt to enhance damages, and its rejection was proper. [Citations.]” (*Ibid.*)

McCullough, supra, 26 Cal.App.4th 289, acknowledged the general rule, but held the court erred in excluding the owner’s development potential evidence aimed at showing the feasibility and adaptability of the remainder to subdivision development. The court reiterated the rule that “[w]hile an owner may not prove damages by bringing in evidence that the take will frustrate a ‘specific plan of development,’ an owner may introduce a map, diagram or illustration of proposed uses of the property to show whether such uses are feasible and whether the property is adaptable to those uses. [Citations.]” (*Id.* at p. 300.)

County of San Diego v. Rancho Vista Del Mar, Inc., supra, 16 Cal.App.4th 1046, held that the owner whose land was condemned for a jail could not value the property based on a highest and best use as a private detention facility. In reaching that conclusion, the appellate court reiterated the general rule that “the condemned property may not be valued based on its special value to the property owner. [Citations.] ‘Mere frustration of the owner’s plans is not generally compensable’ [Citation.] ‘Evidence of the owner’s plan of development is not admissible where its purpose is to show loss of profit or enhanced damages which would be suffered by being prevented from carrying out a particular scheme of improvement. [Citations.]’ [Citation.] ‘Speculative and conjectural calculations of prospective receipts and expenditures and consequent profits to be derived from a prospective enterprise not only throw no light on the issue of the market value of the land to be used in the enterprise, but operate to confuse and mislead

the minds of the jurors. [Citation.]’ [Citations.] Thus, the cases have generally held that a property owner may not value his property based upon its use for a projected special purpose or for a hypothetical business. [Citations.]” (*Id.* at pp. 1058-1059.)

In *Princess Park*, *supra*, 270 Cal.App.2d 876, the trial court excluded economic feasibility studies showing the proposed development of the entire parcel without regard to the contemplated freeway acquisition. (*Id.* at pp. 883-884.) The condemner objected to the evidence of the study and the related subdivision tract map “on the basis that it constituted an attempt either to value the property as though it had been subdivided into lots or to show the frustration of a particular plan of development and that it was, in either event, irrelevant to the issues.” (*Id.* at p. 884.) The appellate court affirmed, stating that the economic feasibility studies “were actually costs of land development based on specific plans and were properly excluded The offer of this evidence constituted an attempt by defendant to obtain a measure of damages based on frustration of a specific plan of development as illustrated by specific costs referred to in the offer of proof, which were substantially above the total severance damages estimated by either of Princess Park’s appraisers. Since ‘ . . . the sketch of a specific plan or development could have no other purpose than to attempt to enhance damages, . . . its rejection was proper.’ [Citations.]” (*Id.* at pp. 884-885.) Moreover, the condemner conceded that the highest and best use of the property was for ultimate subdivision development and all acknowledged that it would be more expensive to develop. (*Id.* at p. 885.) Consequently, the evidence was “cumulative” and the trial court acted within its discretion to exclude the evidence under Evidence Code section 352. (*Ibid.*)

Nor is *Harcros Pigments*, *supra*, 101 Cal.App.4th 1083 on point. In that case, the court held it error to admit evidence concerning the agency’s specific development plans for the property where no one disputed the highest and best use for the property and no other materiality was shown. (*Id.* at pp. 1105-1106.) According to the court: “[E]vidence of specific project plans is inadmissible in the absence of specific facts or points of contention that demonstrably enhance the probative value of the evidence to a point where it outweighs the inherent potential for prejudice. That test is not satisfied

merely because the plans ‘illustrate’ or ‘demonstrate’ an undisputed potential use for the property. If evidence of project plans could be introduced on that rationale, it would seem to be admissible in *every* case, and the rule . . . would cease to exist.” (*Id.* at p. 1105.) Evidence of the agency’s plans for the property was not sufficiently probative on the feasibility of development as evidence of the agency’s plans for development had little tendency to show how a hypothetical buyer in the open market would have viewed the projected obstacles to development. (*Ibid.*) In the instant case, the evidence was highly probative, not as to highest and best use, but on the hotly contested issue of the cost to cure the parking loss that the market would recognize in valuing the property.

The rule against enhancing damages by evidence of specific development plans applies to instances where the owner tries to show that its specific plan for development was frustrated by the severance. That was not the case here. The condemnation did not frustrate a parking “plan” that the owners intended to carry out before the severance. Betts testified that the market would require the parking be replaced; that replacement by a garage was the only feasible way to replace the parking. “If this shopping center is sold without the parking replaced, the buyer is going to look at the situation, know that he has got to bring it up to code, has to build parking, he is going to reduce [his offer] by that amount.” Both parties introduced evidence as to the cost of constructing a replacement garage as part of a cost-to-cure measure. They differed as to the detail and specificity of their analyses. Both located the replacement garage at the same place on the remainder. Owners arrived at their \$20,830 per space replacement estimate by relying upon estimations of the number of replacement spaces required, combined with expert design and cost of a replacement garage that recognized the particular constraints of the site and the height, building and design restrictions imposed by the City. SamTrans’s expert Talmage also based his \$13,200 per space estimate of the replacement garage cost upon estimates of the number of spaces required to replace the lost spaces (as included in conceptual drawings prepared by traffic consultant Mincey) and upon the Marshall Valuation Service cost-estimating manual.

SamTrans argues that no evidence was presented that the Owners' specific replacement garage plan was "market driven." We believe that Betts's testimony adequately supported the conclusion that the building of a replacement garage was "market driven." As to the Owners' proposed replacement parking garage, Owners presented evidence the site was chosen as less expensive than other alternatives, given height and other legal restrictions and soils and space limitations.

SamTrans's related claim that Owners' proposed garage was "gold plated," in that it included extravagant and unnecessary design features and landscaping and that the site was more costly than other locations, is similarly unavailing. Whether the Owners' cost estimates for the parking garage were inflated beyond what the market would recognize as the cost to replace the parking, bears upon the disputed issue of which of the two parties' cost-to-cure estimates more accurately reflected the market. That question was for the jury to determine.

We note the jury arrived at an award of severance damages attributable to parking loss (\$17,326,600) which was considerably below that argued for by Owners (\$30,125,600 for loss of 1,128 spaces) and considerably above that estimated by Talmage for SamTrans (\$9,675,000 for 733 spaces to replace 536 spaces lost, discounted and adjusted to a severance damages value of \$7,599,771 before reduction for asserted project benefits).

The court did not err in denying SamTrans's motion in limine to exclude Owners' evidence of replacement garage costs.

3. Testimony based on potential loss of use of the garage "footprint"

SamTrans also contends that the trial court erred in allowing Betts to testify, over its objection, to severance damages based on the temporary loss of use of the "footprint" area of the replacement garage. Betts testified that during the 12 to 18 months of construction of the replacement garage, Owners would suffer severance damages flowing from the temporary loss of 288 parking spaces on what the parties identify as the "footprint" area of the replacement garage. He valued this component of parking loss at \$267,600 using the same square foot rental factor as Carneghi had used in calculating the

temporary loss of parking due to the BART construction easement during construction of the station, adjusted to 12 months, rather than four years.

SamTrans argues that, unlike the temporary easement for construction of the BART station, SamTrans did not acquire any right to enter upon the replacement garage footprint. The Owners' retained all rights to exclude anyone from entering upon that property. However, this same argument could be made to almost any component of severance damages.

SamTrans also contends that the footprint of the replacement garage was entirely upon Sears's property, that Sears had never collected rent for its use, and that the jury had expressly rejected the award of any lost "goodwill" (akin to loss of rental value) to Sears. At root, SamTrans complains that any award of damages attributable to the temporary loss of parking on the "footprint" during construction of a replacement garage (which SamTrans contends was unnecessary in any event) was speculative, remote, contingent and did not flow *directly* from the taking. (See, e.g., *McCullough*, *supra*, 26 Cal.App.4th at pp. 296-297; *Rudvalis*, *supra*, 109 Cal.App.4th at p. 688.)

"Severance damages must be based upon real physical disturbance of a property right and a decrease in market value of the property rather than upon remote possibilities which are highly speculative and conjectural. [Citations.]" (*Ventura County Flood Control Dist. v. Security First Nat. Bank*, *supra*, 15 Cal.App.3d at p. 1002.) Owners counter that their evidence demonstrated that construction of a replacement garage was necessitated by the take and that such construction will necessarily result in a "real physical disturbance of [the Owners'] property right" that would not have occurred but for the take. (*Ibid.*) We conclude the trial court did not err in allowing Betts to testify as to this damage.

However, were we to conclude the court should have excluded this testimony, SamTrans has failed to demonstrate it was prejudiced by admission of this evidence. SamTrans must show that but for the asserted error, it was reasonably probable the award of severance damages would have been at a figure more favorable to SamTrans. (*Harcros Pigments*, *supra*, 101 Cal.App.4th at pp. 1106-1107; *McCullough*, *supra*,

26 Cal.App.4th at p. 301 [applying the harmless error test to severance damages error and finding it “reasonably probable that a result more favorable to defendants would have occurred in the absence of the trial court’s erroneous ruling”].) SamTrans has failed to establish that the jury even awarded damages for the temporary loss of the footprint. The amount awarded for severance damages attributable to “parking loss” was considerably less than that sought by Owners and the special verdict form does not indicate whether any portion of the parking loss damages were attributable to the temporary loss of parking on the footprint. Indeed, SamTrans’s argument that this award is comparable to lost rental value and that the jury rejected Sears’s claim of loss of goodwill, reinforces our conclusion that SamTrans has failed to show prejudice.

4. *Damages for temporary parking easement on the “porkchop”*

Owners were entitled to seek compensation for the temporary construction easement and any severance damages based on the diminution in value to the remainder. (See 1 Matteoni & Veit, *supra*, §§ 4.81, 5.27, pp. 206-207, 271.) SamTrans contends that the court erred in allowing Betts’s calculation of severance damages to include the cost of replacing 178 parking spaces located in the area of the temporary construction easement acquired by SamTrans on the “porkchop.” The temporary construction easement taken by SamTrans was to continue for approximately four years during construction of the BART station. Thereafter, that portion of the porkchop would be returned to Owners. SamTrans claims that Betts included an estimated \$4 million in his cost-to-cure compilation based on permanent replacement of these spaces in the parking garage.²¹ It further contends Betts failed to consider the value of this property in its “after” condition, arguing that the evidence showed it would still be usable to meet City parking ratio requirements, for employee parking, for customer overflow parking, and/or for construction of a commercial building. Consequently, SamTrans maintains that Betts’s

²¹ We note here that SamTrans’s record citations do not contain testimony by Betts attributing approximately \$4 million in severance damages to this particular property.

conclusion that this property lost all value, was without foundation and violates the principle that merely rendering property less desirable for certain purposes does not constitute compensable severance damages. (See *Rudvalis, supra*, 109 Cal.App.4th at p. 679; *City of Los Angeles v. Geiger* (1949) 94 Cal.App.2d 180, 191 (*Geiger*).) We disagree with SamTrans's characterization of this evidence.

Betts and parking expert Smith testified that the portion of the "porkchop" returned to the owners would no longer be usable for shopping center customer parking after BART construction for two reasons: The tall BART garage would sit between this portion of the "porkchop" and the rest of the shopping center. Consequently, the returned portion of the "porkchop" would be visually and physically "isolated" from the rest of the shopping center, rendering it unfit for customer parking. Moreover, because of its location across from the BART garage, BART users would park in that area, "poaching" parking from the shopping center.²² Because the property would be isolated from the rest of the shopping center, it would be "very difficult to patrol, as a practical matter, it is unmanageable."

The relevance of this evidence was not to show that the returned portion of the "porkchop" had no value and must be viewed as a separate item of severance damages. Rather, the relevance of the loss of the 178 parking spaces included in the temporary construction easement was in relation to the total loss of parking in the shopping center attributable to the take and Betts's expert opinion that the price paid by a willing buyer would necessarily be *reduced* by the cost of replacing the parking. SamTrans's view of each portion of the remainder property as separate from the others is contrary to the trial court's determination that the entire shopping center (excluding the "bone") constituted the larger parcel. It was the larger parcel as a whole that suffered severance damages in the amount of the cost to replace the lost parking.

²² "Poaching" refers to the illegal parking that occurs near BART stations due to overflow parking at BART.

SamTrans disputed Owners' claim that the "porkchop" remainder could not be productively used for shopping center parking. However, whether or not the returned portion of the "porkchop" would be available for shopping center parking, and whether SamTrans had demonstrated that some other use for that parcel was feasible (and could provide an offset to severance damages), was a factual matter for resolution by the jury. The testimony of Betts and Smith that the returned portion of the "porkchop" would no longer be available for shopping center parking had an adequate foundation.

SamTrans's reliance on *Geiger, supra*, 94 Cal.App.2d 180, is unavailing. There, the owners sought severance damages for a property right that they did not possess before the taking. The appellate court held that the owners were not entitled to severance damages due to the impairment of their access from their property to Cahuenga Boulevard, where owners "had no right of access of any character from their property . . . directly to Cahuenga Boulevard." (*Id.* at p. 182.) They had neither an easement nor any agreement to procure a right of way and there was no physical disturbance of their property. (*Id.* at p. 185.) Here, of course, there is no question that Owners owned the take property and the property injured by the take.

Moreover, even if the court erroneously allowed Betts to testify about the loss of parking on the "porkchop" after its return, once again SamTrans has failed to demonstrate it was prejudiced. (*Harcros Pigments, supra*, 101 Cal.App.4th at pp. 1106-1107; *McCullough, supra*, 26 Cal.App.4th at p. 301; *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444.) Owners sought severance damages of \$39,175,600, more than \$30 million of which was related to parking loss. The special verdict identified \$17,326,600 of the award as "attributable to parking loss." SamTrans has failed to show that any of the award was for replacement of the 178 spaces Owners asserted had been lost on the returned portion of the "porkchop."

5. Challenge to evidence of "poaching" by BART patrons

SamTrans claims the trial court abused its discretion in admitting evidence that BART patrons will illegally park on shopping center property; in refusing SamTrans's "curative" instruction; and in giving Owners' Special Instruction No. 6.

(a) SamTrans moved in limine to exclude evidence of poaching as irrelevant and unduly time consuming. The trial court denied the motion. SamTrans argued that poaching did not affect the value of the property, *except* insofar as a reasonable buyer would take into account the cost of steps needed to prevent poaching. Owners countered that evidence that the BART garage could not accommodate BART commuters' parking needs and that poaching on Tanforan property (particularly on the returned remnant of the "porkchop") would necessarily occur and would worsen over time, was essential to rebut SamTrans's argument that it was unnecessary to replace every one of the 1,128 parking spaces Owners contended had been lost due to the project. We conclude the trial court did not abuse its discretion in admitting evidence relating to poaching.

It is true that, "[t]o recover severance damages, . . . the loss in market value claimed must directly and proximately flow from the taking. Damage which is speculative, remote, imaginary, contingent, or merely possible, or damage caused by competition, or recovery in advance for torts or other injuries that may or may not be committed cannot serve as a legal basis for recovery. [Citations.]" (*Arnerich v. Almaden Vineyards Corp.* (1942) 52 Cal.App.2d 265, 272 (*Arnerich*).) However, the evidence of poaching presented in this case did not point to damages that were "speculative, remote, imaginary, contingent, or merely possible." (*Ibid.*) Nor did they constitute "recovery in advance for torts or other injuries that may or may not be committed" (*Ibid.*)

A well informed buyer's reasonable fear of danger because of a particular construction project may result in a diminution of property value and, accordingly, compensable severance damages. (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1346-1349, disapproved on other grounds in *Continental*, *supra*, 16 Cal.4th 694, 720; see 1 Matteoni & Veit, *supra*, § 5.29, pp. 274-276.) Courts have allowed recovery for different types of potential dangers, including among others, fear of electromagnetic radiation caused by power lines (*San Diego Gas & Electric Co. v. Daley*, at pp. 1346-1349), fear of electrocution from the same (*Pac. Gas etc. Co. v. W. H. Hunt Estate Co.* (1957) 49 Cal.2d 565, 572), and danger of seepage and flood from a project to raise lake waters (*Yolo Water & Power Co. v. Hudson* (1920) 182 Cal. 48, 52). Here, the

evidence relating to poaching was not merely speculation. It was a likely result of the project and a well-informed buyer would consider its impact upon the market value of the center.

Furthermore, Owners did not claim that they were entitled to receive separate severance damages to compensate for BART poaching. Rather, their evidence relating to poaching on shopping center property came in the context of attempting to demonstrate that, contrary to SamTrans's claim, Owners needed to replace every parking space taken; to support Owners' argument that it would be infeasible for customers or employees to park on the "porkchop" remnant after its return; to support their contention that the cost of operation and maintenance of the replacement garage should include video monitoring not only for security reasons (the primary purpose), but also to counter poaching; and to counter SamTrans's claims that any poaching could be remediated by relatively inexpensive measures. Although testimony about poaching also related to the Target garage, the bulk of the testimony and argument went to the need to include replacement of the 178 parking spaces on the "porkchop" remnant. Owners also pointed out that SamTrans's appraisal expert Talmage had not considered the overflow parking problem in opining that not all parking spaces needed to be replaced.

SamTrans contends that possible future torts and illegal acts—such as illegal parking—cannot provide a basis for severance damages. The cases it relies upon for this statement are distinguishable.

Rudvalis, supra, 109 Cal.App.4th 667, held in a city's eminent domain action against owners of commercial nurseries that it was error to award the owners severance damages consisting of diminution in value of nursery improvements and personal property on the theory that the city's project, a road extension, accelerated residential development, thereby shortening the economic life of the nurseries and rendering their nursery assets to be without value. (*Id.* at p. 672.) The Court of Appeal held, as a matter of law, the economic damages the owners sought were neither caused by the construction or use of the project nor the result of the condemnatory act in and of itself. Thus, the losses were not compensable. It is damages to the remainder caused by the taking that is

the subject of a condemnation action. In short, the owners' claimed shortened life expectancy and depreciation of nursery business assets and improvements was caused not by the construction and use of extended roads, but by the residential development on surrounding properties. (*Id.* at pp. 680-687.) The owners had failed to show causation between the project and their losses. Urbanization and development influences occurred before the project and would have occurred whether or not the road extension passed through the owners' properties. (*Id.* at pp. 686-687.)

Here, of course, there was no question of "causation" or of pre-existing development influences. Owners presented evidence that the BART garage could not accommodate the expected parking needs of passengers and that poaching would be a direct and virtually inevitable result of the project.

Arnerich, supra, 52 Cal.App.2d 265 and *Gas & Electric Co. v. Miller & Lux Inc.* (1931) 118 Cal.App.140, also relied upon by SamTrans, are distinguishable as they hold that the witnesses' opinions were based upon damages that either were not compensable in a condemnation action or that were highly remote and conjectural.

In *Arnerich, supra*, 52 Cal. App.2d 265, the plaintiff public utility operator brought an eminent domain action to obtain an underground right-of-way easement for existing pipelines across a corner of the defendant's land, the remainder of which was used for agricultural crops. (*Id.* at pp. 266-267). The defendant diverted water for irrigation from a creek flowing along the boundary of its lands. The plaintiff pumped the water from wells on her property and piped it to customers. The defendant sought severance damages on the ground that it was damaged because the creek water would be diminished by plaintiff's pumping, that the competition for water would diminish the defendant's profits, and that the condemned land was so strategically located that a pipeline through it was the only feasible means by which to convey water to customers to the north. (*Id.* at pp. 267-268.) All experts admitted that the condemned easement did not physically affect the main parcel. (*Id.* at pp. 268-269.) The trial court struck that testimony and the appellate court affirmed on the ground the loss in value did not directly and proximately flow from the taking. (*Id.* at pp. 270-272.) The court held that the

plaintiff was not seeking to condemn any water rights of the defendant and that the action did not involve the superiority of the competing water rights claims. The defendant could not convert the condemnation action into an action for damages for injury to its water rights caused not by the pipeline crossing onto its property, but by pumping on the plaintiff's property. (*Id.* at p. 271.)

Gas & Electric Co. v. Miller & Lux Inc., *supra*, 118 Cal.App. 140, found that the trial court had not abused its discretion in limiting the severance damages testimony by two of plaintiff's witnesses. The court observed that "the witnesses were basing their opinions upon *remote possibilities of damage which were highly speculative and conjectural.*" (*Id.* at pp. 143-144, italics added.)²³

Far from being speculative, contingent, or remote, the evidence presented by Owners showed that the BART garage could not accommodate the parking needs of its patrons and that poaching of Tanforan parking was virtually certain to occur. Moreover, as we have observed above, the evidence of poaching was directly relevant to Owners' claim that they needed to replace all of the parking loss attributable to the project.

²³ The court described these "remote" possibilities: "the possibility of damage to crops upon the remaining land in the event that respondent's employees wrongfully trespassed thereon; the possibility of fires resulting from carelessness on the part of said employees; the possibility of escaping gas and possible fire which might result from a break in the pipe caused by earthquake, lightning or a bullet from a high-power rifle penetrating the ground and piercing the pipe; the possibility of interference with irrigation pipes, although no such irrigation pipes had been used and appellants' witness admitted that no great difficulty would be encountered in the event that appellants desired to lay such pipes; the possibility that damage might result from the flow of the streams in the event that respondent cut the banks of said streams rather than boring thereunder although it did not appear that it was anticipated or necessary to cut such banks; and the possibility that some prospective buyers might be prejudiced against easements of any kind, although numerous witnesses owning property in the vicinity testified that neither the use nor value of their land was affected by similar easements. The rule is that severance damage must be based upon some real physical disturbance of a property right which naturally tends to and actually does decrease the market value and that mere fears of remote or contingent possibilities of damage are not sufficient." (*Gas & Electric Co. v. Miller & Lux Inc.*, *supra*, 118 Cal.App. at p. 144.)

(b) SamTrans sought to have the court instruct the jury as follows: “You have heard testimony in this case by defendants that the BART project will cause poaching, loss of access, loss of visibility and interference with traffic circulation. Such claims are not part of the severance damages to which defendants have testified and may not be the basis for an award of severance damages.” The trial court modified the instruction by eliminating the word “poaching” and gave the modified instruction. Our conclusion that evidence of poaching was properly admitted supports the conclusion that the court did not err in eliminating the term “poaching” from this instruction.

(c) The trial court also gave Owners’ Special Instruction No. 6 as follows: “Defendants have only one opportunity to be made whole for all present and future losses caused by Plaintiff’s take. Defendants are entitled to assume the ‘most injurious use of the property reasonably possible,’ for purposes of seeking severance damages for their just compensation.”

The instruction was based upon *County of San Diego v. Bressi* (1986) 184 Cal.App.3d 112, 123 (*Bressi*.) SamTrans concedes that the instruction was a correct statement of the law, but argues the only “injurious use” to which it could relate was poaching, and that the award of severance damages for poaching was improper. At the motion in limine hearing on this instruction, Owners argued that poaching was an injurious use caused by the project, similar to the avigation easements which occasioned the instruction in *Bressi*, at page 115.

Poaching was identified as the “most injurious use” during Owners’ closing argument.²⁴ However, this statement was in the context of Owners referring to the

²⁴ Owners’ counsel argued that BART’s proposed compensation was “neither fair nor just compensation. It doesn’t make the Defendants whole.” ~(26a RT 4344)~ “This is another instruction you are going to receive at the end of the arguments in this case. This instruction is important. I think it bears on not only the approach but the number of different appraisal issues that arise in this case. The first point is the Defendants have only one opportunity to be made whole. We suffered a loss. We need to replace parking. No one knows to an absolute certainty exactly what that precise cost is. [¶] What you have to decide is who’s approach is more likely to get to the actual number. Is it Mr.

instruction in rebutting SamTrans’s claims that Owners did not need to replace all of the parking lost to SamTrans and that infrastructure benefits could offset damages. For example, counsel for Owners argued that “[i]nstead of assuming the most injurious use of the property what I find most interesting here with Mr. Talmage instead of assuming the worse case for the Defendants in his approach to arrive at compensation he assumed the best case for BART. When he does that, he finds ways to reduce the compensation. You have all that parking. I don’t think you are going to need it. That’s a best case scenario for BART. That is not the worse case of . . . injurious use of the property for this Defendant.”

In its reply brief, SamTrans for the first time on appeal argues that to the extent Owners did not seek severance damages for poaching as a separate, compensable damage, they violated Evidence Code section 822,²⁵ by using a “non-compensable element of damage [(poaching)] as a way of propping up their \$30 million parking garage.” SamTrans has waived their specific claim that introduction of evidence of poaching violated Evidence Code section 822 by failing to raise it in their opening brief. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶¶ 9:78-9:78.3,

Talmage’s approach 50/50 reduction? Is it Mr. Betts’[s] approach relying upon a specific design garage relying upon a qualified contractor? [¶] What you are also going to be instructed to do [*sic*] Defendants are entitled to assume the most injurious use of the property reasonably possible. This comes up when you apply this instruction, comes up to the number of circumstances in this case. Poaching is maybe the first, one of the most injurious use of the property by BART. How is that going to affect the parking situation at Tanforan? We have an understanding of the size of the BART garage. We are going to have people who are coming and using the parking fields at the Tanforan Shopping Center before it opens.”

²⁵ Evidence Code section 822, provides in relevant part: “(a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 812, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property: [¶] . . . [¶] (5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.” (Evid. Code, § 822, subd. (a).)

pp. 9-23 to 9-24; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.)

(d) *Prejudice.* In any event, we are convinced that SamTrans has failed to demonstrate prejudice from the admitted evidence concerning “poaching,” from the elimination of the word “poaching” from SamTrans’s proposed instruction, or from the giving of Owners’ Special Instruction No. 6. (See *Harcros Pigments, supra*, 101 Cal.App.4th at pp. 1106-1107; *McCullough, supra*, 26 Cal.App.4th at p. 301; *Conrad v. Ball Corp., supra*, 24 Cal.App.4th at p. 444.) As indicated above, the bulk of the poaching evidence related to the 178 spaces on the returned portion of the “porkchop.” We have previously concluded that SamTrans has failed to show that any of the severance damages award was attributable to Owners’ claim of a need to replace these spaces. Similarly, SamTrans has failed to show that any portion of the \$17,326,600 awarded for parking loss was attributable to or influenced by the poaching issue.

Furthermore, we see no “reasonable probability” that the jury would have reached a result more favorable to SamTrans had Owners’ Special Instruction No. 6—concededly a proper statement of the law—been eliminated, or had the word “poaching” not been stricken from SamTrans’s proposed instruction.

IV. No Conflict Between Verdict and Instruction on Determination of Severance Damages

SamTrans contends that a new trial is required because the jury’s verdict necessarily conflicts with BAJI No. 11.85, instructing the jury that it was to determine severance damages by subtracting the value of the remainder after the take from the value of the remainder in its before condition. SamTrans also contends that the special verdict form, as modified by the court to include a breakout of damages attributable to parking loss, directed the jury toward the Owners’ assertedly erroneous cost-to-cure theory of the case and away from BAJI No. 11.85. Both claims are essentially repackaged versions of SamTrans’s primary claim that the court erred in allowing Owners to present evidence of severance damages using a cost-to-cure methodology. We have rejected that claim.

The jury was instructed in accordance with BAJI No. 11.85 as follows:

“Where the property being taken is only part of a larger parcel of property, in addition to compensation for the property being taken, the defendant is entitled to recover compensation called severance damage for the damage to the remainder. Damage to the remainder is the damage caused to the remainder by each or both of the following: [¶] [(a)] the severance of the remainder from the part taken. [¶] [(b)] the construction and use of the project for which the property is taken in the manner proposed by the Plaintiff whether or not the damage is caused by a portion of the property located on the part taken. [¶] *Severance damages are determined by ascertaining the market value of the remainder as of the date of valuation and by deducting therefrom the market value of the remainder after the severance of the part being taken and the construction of the project in the manner proposed by the Plaintiff.* Compensation for injury to the remainder shall be based on the project as proposed.” (Italics added.)

The jury here was also properly instructed in terms of BAJI No. 11.86 (1999 rev.), which provides: “In assessing the damages to the Defendant[s’] remaining property, caused by the project, you may not include any factors that are speculative or imaginary and you may not include any purely personal elements that do not affect the property’s fair market value. Severance damages can, however, be based on any factor, resulting from the project, that causes the decline of the fair market value of the property.”

SamTrans does not challenge these instructions, which both parties requested, but rather argues that the verdict “necessarily conflicts” with the italicized portion of BAJI No. 11.85, because the verdict was the result of Owners’ erroneous use of cost-to-cure methodology—adding together discrete costs to cure—to calculate severance damages. SamTrans again asserts that the Owners’ expert appraisers had not appraised the property in the “after” condition and consequently there was no basis by which the jury could have deducted the market value of the remainder in the after condition from its market value before the take as directed by BAJI No. 11.85.

As discussed heretofore (pts. III.C. & III.E., *ante*, at pp. 34-35, 39-64), the premise is faulty. Contrary to SamTrans’s claim, the Owners did present evidence of the value of

the property in its “after” condition. Betts’s testimony relating to cost to cure the parking loss was tied directly to the market value of the property in its after condition.

Tobriner I, supra, 153 Cal.App.3d 367, does not assist SamTrans. There, as described previously, the appellate court affirmed the grant of a new trial motion where the trial court had initially allowed evidence to be introduced on an erroneous theory—that severance damages arising from the condemnation of an existing appurtenant easement could be based on the benefit to the servient tenement (making it available for development by its owner), rather than being based upon the diminution in value of the dominant tenements which had previously held the easement. (*Id.* at pp. 372-374.) The trial court granted a new trial and the appellate court affirmed, finding that the defendant owners of the dominant tenement, despite proper instructions by the court as to how to value the severance damages, had continued to use the predetermined amount, derived from appraising the unencumbered development potential of the servient fee underlying the easements, and had simply recast that evidence before the jury as diminution in the value of the dominant tenement. (*Ibid.*) Recognizing that a “trial court’s discretion to grant a new trial is quite broad,” the court affirmed the new trial grant where the record showed that “prejudicial error occurred at trial because the court had allowed the admission of evidence based on an invalid measure of value.” (*Id.* at p. 374.)

Here, of course, the trial court *denied* SamTrans’s new trial motion; we have previously concluded that the use of cost-to-cure methodology in support of the determination of severance damages was not an invalid measure of value; and we have determined that, contrary to SamTrans’s view of the facts, Owners did adequately link severance damages to the diminution in fair market value of the remainder attributable to the project.²⁶

²⁶ As we have previously stated, severance damages in this state may be shown either by proving the market value of the remainder before and after the taking and leaving the computation of the difference to the jury, “ ‘or by competent evidence of severance damages in a lump sum. . . .’ ” (*People v. Ricciardi, supra*, 23 Cal.2d 390, 401; *Pacific Gas & Elec. Co. v. Hufford, supra*, 49 Cal.2d 545, 555; *People v. Hayward Bldg.*

“A verdict is ‘against the law’ when it is contrary to the instructions given the jury. . . . It is possible to determine whether a verdict is contrary to an instruction only when the evidence on a point covered by the instruction is without conflict and fails to show a set of facts, which under the instruction, would warrant the verdict reached. Where the evidence on that point is conflicting but sufficient to support a finding of fact under which the instruction warrants the verdict, it must be presumed that the jury would make such a finding and hence its verdict is not contrary to the instruction and not against the law. [Citation.]” (*Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.* (1973) 35 Cal.App.3d 948, 958; cf. *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 160; *Kralyevich v. Magrini* (1959) 172 Cal.App.2d 784, 789.)

The evidence here was sufficient to support the severance damages findings made by the jury in accordance with the instructions provided, including BAJI No. 11.85.

Materials Co., supra, 213 Cal.App.2d 457, 464-465.)” (*Sweet, supra*, 255 Cal.App.2d at p. 904.)

In what appears to be an attempt to prevent Owners from relying upon the foregoing “lump sum” severance damages theory, SamTrans argues that Owners first proposed, then withdrew, a cost-to-cure instruction. (The record citations by SamTrans do not indicate why the instruction was not given.) In a somewhat perplexing argument, SamTrans appears to contend that withdrawal of this proposed instruction prevents Owners on appeal from pointing to the cost-to-cure evidence as supporting the verdict. As a general proposition it is true that a party may not seek appellate review on a theory never tendered. (See *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534-1535 [appellant’s failure to furnish the appellate court with the instructions received by jury prevented appellant from contending that the verdict was “against the law”].) However, this doctrine of waiver applies to *appellants* seeking to overturn a judgment and is in any event, a doctrine application of which is subject to appellate court discretion. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶¶ 8:229-8:233, 8:241, 8:243, pp. 8-135 to 8-136, 8-140.) “The rule against raising new theories on appeal is limited by the rule that an appealed judgment or order will be affirmed if it is *correct on any theory*. . . . Thus, *respondent* can assert a new theory on appeal in order to establish that the judgment was correct on that theory” (*Id.*, at ¶¶ 8:241, p. 8-140.) The rule is, in any event, inapposite here, where appropriate instructions were given and the record is adequate for review.

Nor do we find any merit to SamTrans's claim that the jury was directed toward the Owner's assertedly erroneous theory of the case and away from BAJI No. 11.85 by the special verdict form which asked the jury to identify what portion of the severance damages award was "attributable to parking loss, if any." (Special Verdict form, Question No. 2a.)

Demkowski v. Lee (1991) 233 Cal.App.3d 1251, cited by SamTrans, is clearly distinguishable. In that case, it was unclear from the verdict forms, when considered in tandem with the instructions, whether the jury had awarded plaintiff a double recovery.²⁷

The specification of the portion of severance damages "attributable to parking loss, if any" in the verdict form, when considered together with the concededly proper instructions, helped to clarify the bases of the jury award here. There was no inconsistency between the proper instructions given and the verdict. Nor was there any inconsistency in the special verdict findings. (See *D.R. Horton, supra*, 126 Cal.App.4th 668, 682-684 [inconsistency between or among answers within a special verdict renders a verdict "against the law"].)

²⁷ In *Demkowski v. Lee, supra*, 233 Cal.App.3d 1251, the plaintiff's employer, a city, intervened in the plaintiff's personal injury lawsuit to recover the workers' compensation benefits it had paid to the plaintiff as a result of the accident. The jury found in favor of the plaintiff and the city. The Court of Appeal reversed the damage awards to both, holding that the trial court had erred in using verdict forms that, in light of the instructions, permitted a double recovery against the defendant. Standing alone, the instructions permitted the jury to award the plaintiff all of his damages and permitted the city to recover all of the benefits it had paid to the plaintiff, even though the combination of such awards would constitute a double recovery. The verdict form was not sufficiently clear to ensure that the jury would exclude or subtract from the plaintiff's total damages the amount of workers' compensation benefits that the city was entitled to recover. (*Id.* at p. 1262.)

V. Exclusion of Evidence of Project Benefits

SamTrans contends the trial court prejudicially erred in excluding its experts' testimony that Tanforan would receive project benefits of increased land value and increased retail sales attributable to the BART project and in instructing the jury that it could not consider any potential increase in retail sales in arriving at its severance damages award.

SamTrans sought to offset the evidence of severance damages by presenting evidence of project benefits that the BART station would bring to the property. Talmage estimated total project benefits to be \$1,890,052. The trial court allowed SamTrans to introduce evidence of project benefits from the infrastructure improvements around Tanforan that BART had built as part of the project. (BAJI No. 11.95 (1999 rev.).) However, it excluded evidence SamTrans sought to introduce that property values of the remainder would increase because of an increase in retail sales attributable to the presence of the BART project. On Owners' motion, the trial court excluded the testimony of SamTrans's benefits expert witnesses Lynn Sedway and Robert Cervero as "speculative" and prohibited Talmage from relying upon them.

Thereafter, on November 1, 2001, more than a month into trial, when SamTrans sought to introduce via an offer of proof similar benefits testimony through Talmage alone (without reference to Sedway or Cervero's opinions), Owners objected on the grounds that Talmage's original and amended valuation statements had not opined on any increased land value attributable to BART that was not based upon Sedway or Cervero's opinions and that the offer of proof included 19 new and unexchanged trial exhibits. The court refused to admit this benefits testimony by Talmage, ruling it inadmissible under section 1258.280, which precludes a witness from testifying on direct examination to any opinion or data required to be listed in the valuation statement unless such opinion or data is listed in the statement served.

The court instructed the jury that it could not reduce its severance damages award by any benefit related to any potential increased retail sales, because "[n]o expert or other witness [had] provided any quantifiable evidence of increased retail sales of Tanforan due

to BART's location next to the center.” (Defendants’ Special Instruction No. 2.) The jury’s special verdict found the remainder property accrued no benefits by reason of the project.

A. *The law*

Section 1263.410, subdivision (b), provides that severance damages for injury to the remainder may be reduced by the amount of the benefit to the remainder.²⁸ Section 1263.430 defines “benefit to the remainder” as “the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff”²⁹ Section 1263.440³⁰ directs, in subdivision (a), that damage and benefit to the remainder be computed to “reflect any delay . . . caused by the

²⁸ “Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510 [loss of goodwill], if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.” (§ 1263.410, subd. (b).)

²⁹ “Benefit to the remainder is the benefit, if any, caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff whether or not the benefit is caused by a portion of the project located on the part taken.” (§ 1263.430.)

³⁰ Section 1263.440 provides: “(a) The amount of any damage to the remainder and any benefit to the remainder shall reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized.

“(b) The value of the remainder on the date of valuation, excluding prior changes in value as prescribed in Section 1263.330, shall serve as the base from which the amount of any damage and the amount of any benefit to the remainder shall be determined.” (§ 1263.440.)

Section 1263.330 provides: “The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following: [¶] (a) The project for which the property is taken. [¶] (b) The eminent domain proceeding in which the property is taken. [¶] (c) Any preliminary actions of the plaintiff relating to the taking of the property.”

construction and use of the project in the manner proposed by the plaintiff . . .” and, in subdivision (b), that the value of the remainder in the “before” condition be considered apart from any enhancement or blight attributable to the project. (See 1 Matteoni & Veit, *supra*, § 5.33, at pp. 278-280.)

In *Continental*, *supra*, 16 Cal.4th 694, the California Supreme Court held the superior court had erred in ruling inadmissible evidence proffered by the Metropolitan Transportation Authority (MTA) that the value of office buildings in other localities increased as a result of their proximity to public transit stations, as well as expert testimony that the value of Continental’s remainder property would increase by several million dollars as a result of the operation of the line and the property’s proximity to a transit station. The trial court had ruled the evidence inadmissible on the ground that proximity to the transit station was a “general” benefit and not a “special” benefit because it was shared by numerous properties in the vicinity. (*Id.* at pp. 698-699.) The Supreme Court reversed the judgment and remanded for a new trial on severance damages. (*Id.* at p. 699.)³¹

Ruling that severance damages could be offset by general benefits, as well as by special benefits, the Supreme Court held “that in determining a landowner’s entitlement to severance damages, the fact finder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property’s fair

³¹ In *Continental*, *supra*, 16 Cal.4th 694, the Supreme Court erased the historical distinction between special benefits that could be used by the condemner to offset severance damages and general benefits that could not be used to reduce severance damages. Special benefits were enhancements in the value of the remainder arising from the construction of the project and peculiar to the land in question. General benefits were the benefits resulting from the project that increased land values in the general area and were not limited to the property in question. (*Id.* at p. 698; see 1 Matteoni & Veit, *supra*, § 5.34, pp. 280-283.) The Supreme Court concluded that “the distinction between general and special benefits no longer finds support in the reasons articulated at its inception,” and that “this lack of support and the difficulties inherent in courts’ efforts consistently to apply the distinction warrant overruling this aspect of *Beveridge* [*v. Lewis* (1902) 137 Cal. 619] and its progeny.” (*Continental*, at p. 699.)

market value, *insofar as such evidence is neither conjectural nor speculative.*” (*Continental, supra*, 16 Cal.4th. at p. 718, fn. omitted, italics added.) In reaching this conclusion, the Supreme Court described the benefits that could be considered as “*all reasonably certain, immediate and nonspeculative benefits*” (*id.* at p. 717, italics added), explaining that the allowance of offset of such benefits “has the virtue of treating benefits and severance damages evenhandedly. (Cf. §§ 1263.420, subd. (b), 1263.430 [parallel definitions of severance damage and benefit].)” (*Continental*, at p. 717.)

1. *Standard of Review.* We review the trial court’s decision to exclude the testimony of SamTrans’s benefits experts under the abuse of discretion standard. (*Rancho Penasquitos, supra*, 105 Cal.App.4th 1013, 1027; accord, *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership, supra*, 95 Cal.App.4th 1066, 1073.) As we have recognized heretofore, the trial court is vested with considerable judicial discretion in admitting or rejecting evidence of value in condemnation proceedings. (*Redevelopment Agency v. Contra Costa Theatre, Inc., supra*, 135 Cal.App.3d 73, p. 86 & fn. 6.) We do not find an abuse of discretion where the trial court’s ruling was “based on a ‘reasoned judgment’ ” and complies with legal principles and policies appropriate to condemnation cases. (*Rancho Penasquitos*, at p. 1027.) “[W]e will only overturn the court’s decision if it ‘ “exceeds the bounds of reason, all of the circumstances before it being considered.” ’ [Citation.]” (*Ibid.*)

SamTrans would alter this traditional standard, arguing that abuse of discretion is shown by the trial court’s exclusion of expert opinion where the opinion “was not based entirely on improper considerations” (*City of Gilroy v. Filice* (1963) 221 Cal.App.2d 259, 272.) To limit the discretion of the trial court so that it could exclude valuation evidence only where the opinion is based entirely upon improper bases would render the abuse of discretion standard a nullity. Rather, the correct statement of the rule is that “[t]he trial judge is vested with considerable discretion in determining whether to admit or exclude valuation evidence, and where the witness’ opinion has both proper and improper bases, the judge *may strike it or permit it to remain* and consider the impropriety in determining what weight to give it. (*County Sanitation Dist. No. 8 v.*

Watson Land Co. (1993) 17 [Cal.App.]4th 1268, 1282.)” (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 104, pp. 651-652, italics added.)³²

In *City of Gilroy v. Filice*, *supra*, 221 Cal.App.2d 259, relied upon by SamTrans, the Court of Appeal *affirmed* the trial court’s admission of valuation testimony where the expert opinion was based upon both proper and improper considerations. In so doing, the court stated: “Where the valuation testimony embraces proper as well as improper considerations, a motion to strike *may* properly be denied and the matter left to the court or jury to determine the weight to be given the testimony. *The question is addressed to the discretion of the trial court.* [Citation.]” (*Id.* at p. 271, italics added.) This statement of the rule was correct. However, the court then continued in a somewhat contradictory fashion in dictum that “the weight to be given [the opinion of value] is largely dependent on the reasons for the opinion and unless the opinion is wholly and entirely based on improper considerations or incompetent matters, the weight to be given the opinion is a question for the trier of fact. [Citation.]” (*Ibid.*) As indicated, we believe that Witkin more accurately states the rule in accord with case law. (See *County Sanitation Dist. [No. 8] v. Watson Land Co.*, *supra*, 17 Cal.App.4th at p. 1282; *South Bay Irr. Dist. v. California-American Water Co.*, *supra*, 61 Cal.App.3d at p. 984.) Clearly the result reached by the court in *City of Gilroy v. Filice* affirmed the exercise of discretion by the trial court and was consistent with this standard.

2. *Opinion Testimony.* Evidence Code Section 814 provides: “The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or

³² “ ‘ “In condemnation proceedings, the trial court is vested with considerable judicial discretion in admitting or rejecting evidence of value.[.]” ’ ([Citation]; *Tobriner II*, *supra*, 215 Cal.App.3d at p. 1093.) ‘When the testimony of a valuation witness is based on considerations which are proper as well as those which are improper, the court, in its discretion, may strike the testimony or permit it to remain and consider the impropriety in determining the weight to be given it. . . .’ (*South Bay Irr. Dist. v. California-American Water Co.* (1976) 61 Cal.App.3d 944, 984)” (*County Sanitation Dist. [No. 8] v. Watson Land Co.*, *supra*, 17 Cal.App.4th at p. 1282.)

before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion.”

“The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon *assumptions which are not supported by the record*, upon matters which are not reasonably relied upon by other experts, *or upon factors which are speculative, remote or conjectural*, then his conclusion has no evidentiary value. [Citations.]” (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135, italics added.)

In *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, the trial court excluded the testimony of an expert witness whose opinion was based upon a review of epidemiological studies of painters who potentially were exposed to more than 130 different chemicals and other substances. The study concluded that these painters contracted cancer at a rate greater than the national average, but did not indicate whether exposure to any single chemical (including any of the five supplied by the defendants) contributed to an increased risk of cancer. (*Id.* at pp. 564-565.) The trial court determined the study did not reasonably support the expert’s opinion that the particular chemicals at issue caused cancer as the study did not indicate whether any single chemical contributed to an increased risk of cancer. The appellate court affirmed even though the study upon which the expert’s opinion was based was of a type reasonably relied upon by experts. The appellate court rejected the appellant’s argument that where an expert relies on the type of matter that experts reasonably can rely on in forming their opinions, the trial court must allow the trier of fact to consider the evidence without regard to whether the matter relied on reasonably supports the particular opinion. (*Id.* at p. 563.) “An expert opinion has no value if its basis is unsound. [Citations.] Matter that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion.” (*Id.* at p. 564.) The court concluded that “the matter relied on

must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible. [Citations.]” (*Ibid.*)³³

B. *Sedway testimony*

SamTrans sought to introduce the valuation testimony of expert witness Lynne Sedway on project benefits and to use her analysis as a basis for an estimate of project benefits by Talmage. Sedway’s analysis of project benefits concluded: “Assuming the mall is renovated, and the BART station is incorporated correctly into the mall redesign, Sedway Group estimates that the BART station will generate between \$13.2 and \$23.1 million in additional sales at the center in 2002. These additional sales will come from three new markets: airport workers, BART commuters, and office workers, hotel guests and residents at the U.S. Navy redevelopment site.”

Sedway reasoned that “the Tanforan BART station will act as a kind of transportation-oriented ‘anchor’ for the mall, pulling in potential customers and increasing foot traffic.”

Sedway speculated that after expansion of the San Francisco International Airport, 45,500 workers were expected to be employed at the airport and that those employees would each spend “about [\$]3,200” annually near their place of work, nearly half of which would be food uses. She opined that airport employees might ride BART from the airport to Tanforan to eat or to shop, either during lunch or after work, including shopping for major purchases, such as appliances. She estimated that on average, airport workers would spend annually \$160 to \$320 per worker at Tanforan—a “capture rate” of 5 to 10 percent of the total amount spent every year by airport workers. Explaining this “average” sum, she observed: “Someone will take a BART train to Sears and buy a refrigerator. Somebody else will never get on a BART train.” She acknowledged that

³³ The California Supreme Court has granted review in a subsequent, related case, *Lockheed Litigation Cases*, review granted April 13, 2005, S132167. The question at issue is the extent to which the trial judge may examine the evidence relied upon by expert witnesses in determining whether it provides a reasonable basis for the expert’s opinion.

the study upon which she based her estimate of the amounts that would be spent by airport workers at Tanforan was a 1987 study of suburban office workers near a major retail mall.

A second new market, she anticipated, was BART commuters driving to Tanforan BART station to board a train to work. She reasoned that “BART officials estimate that 9,112 trips will be generated at the Tanforan BART station every day when it opens in 2002.” The summary report acknowledged that she had been “unable to find any authoritative studies documenting how much transit riders tend to spend on retail in station areas,” and that it was “important to note that very little information is available on quantifying capture rates.” However, using her professional judgment and BART demographics, she estimated that an individual commuter would spend about \$725 to \$1,015 per year at Tanforan.

Finally, she relied upon a proposed mixed-use project on approximately 55 acres of a U.S. Navy site at the intersection of Sneath Lane and El Camino Real, within walking distance of Tanforan BART. Office space, hotel rooms and residential units were planned and greater density was being allowed than typical. Sedway believed these BART users (people not originally projected to use BART) would travel through the mall to enter and exit the BART station. She testified at deposition that she thought it “very likely” that hotel users at the renovated site would walk half a mile or more to get to BART for a ride to the airport. Sedway testified that the naval site development was “due to break ground in 2002,” but that they had not received all of the necessary entitlements.

Sedway’s analysis explicitly “assumes that Tanforan Shopping Center will undergo a major renovation over the next several years.” The “conclusions” section of the analysis states: “We believe the BART station will not likely help the inline shops if it is not incorporated and integrated into the redesign of the mall. Consistent with Tanforan’s alternative designs, the mall must be reconfigured so that the BART station is part of the mall, and customers are forced to travel through the mall to enter and exit the BART station. . . .” Sedway’s deposition testimony reaffirmed that the analysis was

based upon her assumption that the center would be redeveloped in such a way as to incorporate the BART station into its design, along the lines that were proposed.

Talmage stated in his deposition that he gave greater weight to Cervero's opinion than to Sedway's values, "because I believed renovation or expansion of the center may, in fact, not take place." Talmage considered "the likelihood [of expansion] to be 50-50." Moreover, he also believed "the distance from the BART station to the department stores and the mall probably would impact value."

Owners successfully sought to exclude Sedway's testimony and analysis of project benefits. They challenged her testimony on the ground that her analysis was based upon speculation and conjecture insofar as it relied on the assumption that additional sales would be generated to Tanforan only if the center was renovated and redeveloped in a particular way so as to incorporate the BART station into its design. Owners also challenged Sedway's conclusions as unduly speculative on the ground that they were based upon her assumptions that airport workers and BART patrons would shop at Tanforan, that the surplus land owned by the U.S. Navy would be developed as a result of BART, and that residents and office workers who might someday reside or work in offices on that site would shop at Tanforan.

We have little difficulty in determining that the trial court did not abuse its discretion in excluding Sedway's testimony in its entirety. The testimony did not meet the Supreme Court's mandate, set forth in *Continental, supra*, 16 Cal.4th 694, that benefits that could be considered were "*all reasonably certain, immediate and nonspeculative benefits*" (*id.* at p. 717, italics added) and its acknowledgement "that the jury shall be permitted to consider only competent evidence that is neither speculative nor conjectural." (*Id.* at p. 718, fn. 5.) Sedway's analysis was premised upon numerous assumptions: the center would be developed in a particular way—an assumption that SamTrans's own expert Talmage estimated to be only a "50-50" possibility; that the U.S. Navy site would be developed—and would be developed along particular lines allowing an increased density—despite the fact that the development had not received necessary permits and entitlements; and that San Francisco International Airport workers

would patronize Tanforan based on studies involving suburban office workers near a regional mall. In addition, Sedway admitted that she had been unable to find *any* authoritative studies documenting how much transit riders spend on retail in station areas and that “very little” information was available to support her “capture rates.”

In these circumstances, the trial court properly exercised its discretion to exclude Sedway’s testimony. As recently reiterated in *City of San Diego v. Barratt American, Inc.* (2005) 128 Cal.App.4th 917, “ ‘ “[t]here is a limit to imaginative claims To say that only the witness’ valuation opinion has probative value, that his ‘reasons’ have none, ignores reality. His reasons may influence the verdict more than his figures. To say that all objections to his reasons go to weight, not admissibility, is to minimize judicial responsibility for limiting the permissible arena in condemnation trials. The responsibility for defining the extent of compensable rights is that of the courts.” ’ (*City of San Diego v. Sobke* [(1998) 65 Cal.App.4th 379,] 396; accord, *City of Stockton v. Albert Brocchini Farms, Inc.* (2001) 92 Cal.App.4th 193, 198, . . . fns. omitted.)” (*City of San Diego v. Barratt American, Inc.*, at pp. 936-937.)

C. Cervero’s testimony

1. *Factual background.* SamTrans also sought to introduce the valuation testimony of expert witness Robert Cervero on project benefits and to use his analysis as a basis for an estimate of project benefits by valuation expert Talmage. Cervero’s analysis of “Estimated Land-Value Premiums at Tanforan Park Shopping Center Attributable to the Opening of an On-Site BART Station” concluded: “[T]he accessibility benefit provided by the opening of a BART station at the Tanforan . . . site will be a 7 to 9 percent increase in land values within a one-year period, all other factors being the same. My best single estimate is an 8 percent capitalization premium over an assumed 30-year BART service life/capitalization period. I consider this to be a conservative estimate, supported by credible evidence. This estimate is informed by a balance of the best empirical evidence from comparable situations and a careful review of numerous background reports I received about the project.”

Owners successfully sought to exclude Cervero's testimony and analysis of project benefits as speculative. They challenged his testimony on the grounds that his opinion was speculative and conjectural, as benefits attributable to BART were premised upon a BART extension to the San Francisco International Airport not scheduled to be operational until mid-2002 at the earliest—three and a half years after the valuation date—and on the ground that his opinion that land values would increase dramatically at Tanforan in the future was based upon data that did not support his conclusion that land values would increase significantly due *solely* to the presence of BART. Owners argued that the studies relied upon by Cervero, with one exception, did not involve benefits to retail property such as Tanforan, that they did not show any “immediate” benefit from transit, and that the sole study discussing benefits of transit on land use and value in a retail context concluded that there was no influence on land use and value.

There was no dispute that Cervero was highly qualified to provide expert testimony as to project benefits. Among the “key factors” he weighed in arriving at his estimate was “empirical evidence to date on the value-added to commercial and retail properties as a consequence of new BART services as well as comparable heavy-rail transit systems” He testified at his deposition that he had not collected original data or carried out statistical analyses as part of his Tanforan analysis. Rather, he used his expert judgment to draw “from the best empirical knowledge from other studies in very comparable situations.”

Cervero testified during his deposition that for purposes of this assignment, he relied upon his 1995 synthesis review of previous studies. He went back to that 1995 synthesis and other studies when he wrote his December 1999 report relating to Tanforan.

Cervero acknowledged that the “vast majority” of studies demonstrating that “proximity to rail transit leads to significant increases in property values and rents . . . have measured impacts on *residential* property values.” (*Italics added.*) He relied upon commercial studies because there were more commercial studies available. He testified that “what I really focused on was a series of nonresidential projects that tell us something about the benefits to commercial, most of them happen to be office but, again,

the order of magnitudes of impacts between office and retail have not been shown to be demonstratively much different.”

(a) *Studies considered by Cervero.*³⁴ During his deposition, Cervero identified the *retail* studies upon which he relied as the Falcke study, the 1980 Damm study of the Washington Metrorail System, and most recently, the Rachel Weinberger study of the Santa Clara County light rail system.³⁵ He also identified the “DART study”³⁶ as “perhaps the best study that specifically looks at retail properties.”

Cervero’s report asserted that “two studies which found unmistakable benefits were conducted in the late 1970s—one on the Washington Metrorail system and the other on San Francisco BART” (citing the Damm study and the Falcke study).³⁷ However, he

³⁴ Principal studies relied upon by Cervero included:

C. Falcke, *Study of BART’s Effects on Property Prices and Rents*, Washington, D.C., Urban Mass Transportation Administration, U.S. Department of Transportation, BART Impact Program, 1978 (hereafter Falcke study).

R. Cervero, *Rail Transit and Joint Development*, Journal of the American Planning Association, Vol. 60, No. 1, 1994 (hereafter Cervero study).

D. Damm et al., *Response of Urban Real Estate Values in Anticipation of the Washington Metro*, Journal of Transport Economics and Policy, Vol. 14, No. 3, 1980 (hereafter Damm study).

R. Weinberger, *Effects of Transportation Infrastructure on Proximate Commercial Property Values: An Hedonic Price Model*, paper presented at the 79th Annual Meeting of the Transportation Research Board, 2000 (hereafter Rachel Weinberger study).

Cervero also cited the Tanforan business plan: The Hapsmith Company, *Tanforan Park Shopping Center Business Plan*, undated; *Tanforan Park Shopping Center: Multiplex Cinema Plan*, undated.

³⁵ Rachel Weinberger’s analysis was conducted as “preliminary input into a doctoral dissertation at UC Berkeley” that, at the time of inclusion in Cervero’s report, was still under way. It was carried out on commercial properties in Santa Clara County and examined rents.

³⁶ B. Weinstein & T. Clower, *The Initial Economic Impacts of the DART LRT System*, University of North Texas Center for Economic Development and Research, July 1999 (hereafter DART study).

³⁷ Cervero also relied upon the “Arthur Nelson study” of MARTA (the Metropolitan Atlanta RTA) in support of his opinion that estimated land value premiums “taper exponentially with distance from rail transit stations” as a basis for his allocation

later acknowledged that the “[value of] the Falcke study . . . is that it looks at Walnut Creek and some suburban areas, not for retail, but more commercial office” and that he thought there was “small ancillary retail, but it’s predominantly office there.” He also admitted that he “[could not] rule out” that the Damm study did not include regional shopping malls within the district.

The Falcke study (also referred to as the Metropolitan Transportation Commission study) sought to determine the impacts of BART stations and tracks on property prices and rents. It found anticipated benefits “had a statistically significant, positive impact on single family residential prices except for one station area, El Cerrito Plaza. *Since service began, this effect has generally disappeared, except for in South Hayward, and even turned negative where BART-related automobile traffic and parking has become a nuisance.* In the aggregate, the effect has been small; the impact diminishes rapidly with increasing distance from BART” (Falcke study, pp. 1-2, italics added.) Impacts on residential rents were not found. There were “some indications that this might be changing, *at least in Walnut Creek where the positive effect of proximity to the station has become statistically more stable and the negative effect of closeness to the tracks has all but disappeared. The sample here, however, is very small, making the above* [illegible] *tentative, but worthy of follow-up research as more data can be added.*” (*Id.* at p. 2, italics added.)

Proximity to a BART station positively affected *office rents* in San Francisco (where the impact was marginal) and Walnut Creek (which saw the largest impact). The impact in Walnut Creek was noticeable only after BART trans-Bay service began. (Falcke study, p. 2, italics added.)

Sales prices of commercial property were investigated only in the Mission District of San Francisco. Cervero acknowledged that the portion of the Falcke study that

of benefits between the four landholder-owners at Tanforan. (A. Nelson, *Transit Stations and Commercial Property Values: A Case Study with Policy and Land-Use Implications*, Journal of Public Transportation, Vol. 2, No. 3, 1999, pp. 77-95.)

described the impact on prices for commercial property near a BART station in the Mission District of San Francisco “warranted some attention” as there was “sufficient comparability.” The study found that “proximity to the BART stations [in the Mission District] had had a substantial impact early when it was anticipated that BART would bring an increase in customers near the stations (walk-in trade). Since these anticipations have largely failed to materialize, the reflection in commercial property prices have also disappeared.” (Falcke study, p. 2.) The Falcke study concluded: “Theoretically, at least BART induced relative shifts in property prices and rents among locations served and not served by BART. However, the actual price and rent changes have been so small relative to the recent substantial [illegible] in property prices in the Bay Area in general that the possible BART [illegible] shift is obscured.” (*Id.* at pp. 3-4.)

Cervero stated the value of the Falcke study “is it looks at Walnut Creek and some suburban areas, not for retail, but more commercial office. There they did find significant effect.” Cervero believed that if Walnut Creek had been zoned for retail, “then presumably you would have seen this accruing to retail establishments,” but that Walnut Creek wanted to protect downtown and exclude retail from the station area.

Cervero interpreted the study as concluding that the authors “were not able to rule out the fact that the BART did not deliver benefits in terms of proximity.” However, he also stated that “they got hit by potentially a general recession, as well as the construction period *could have* brought some decline in business.” (*Italics added.*)

Consequently, Cervero rejected the conclusion and the bulk of the analyses of the Falcke study (including rejection of the only portion of the study relating to commercial property sales prices) and apparently relied only upon its findings for office rents for Walnut Creek.

The 1980 Damm study of the Washington D.C. area Metrorail system that Cervero relied on as showing “unmistakable benefits” and involving retail properties, was based upon research undertaken in the 1970’s, *before* the 1978 opening of the system. Cervero acknowledged that the Damm study was an analysis of empirical recorded land value benefits occurring *in anticipation of the opening of the rail system*. Cervero admitted that

the study did not look at whether or how much land values increased after the system was opened.

The 1999 DART study, also relied upon by Cervero, characterized the findings of the Damm study and another study done around the same time as concluding “*that the impact of rail transit on property values was, at most, indirect and limited to areas characterized by other favorable factors* such as the availability of developable land, positive economic, political and social conditions, and coordinated government policies for development ([citation]; Damm [study] 1980).” (DART study, p. 4, italics added.)

The DART study of the impact of urban rail transit on residential and commercial property values was undertaken to analyze the impact of Dallas’s light rail transit system—completed in 1996—on property values. The authors began with a review of academic and professional literature on rail transit and property values. They found such literature usually began with the assumption any significant improvement in the transportation system that increases accessibility and reduces transportation costs should be capitalized in land values. The DART study concludes that “[e]mpirical research, however, paints a decidedly more complicated picture. One in-depth review of this issue concluded that the empirical research has seldom supported theoretical expectations [citation]. A more recent review concludes that the capitalization effects of rail transit are actually *extremely modest and highly variable* (Cervero and Landis 1995[³⁸]).” (DART study, p. 3, italics added.)

With reference to BART, the DART study states:

“San Francisco’s [BART] system has received the greatest attention from researchers. The earliest BART study to look at impacts on residential property values yielded mixed results: Only a handful of the neighborhoods studied showed noticeable impacts on property values [citation]. Two more studies concluded that BART had

³⁸ Cervero, R., and Landis, J. (1995). *Development Impacts of Urban Transport: A U.S. Perspective*, in Banister, D. (ed.), *Transport and Urban Development*, Chapman & Hall, 136-156.

encouraged the decentralization of both population and employment in the Bay Area, which seems to suggest downward pressure on inner-city property values [citations]. Several other studies, meanwhile, concluded that BART depressed adjacent property values for a variety of aesthetic and social reasons, including increased noise and vibration, increased automobile traffic, the perceived accessibility of lower classes to previously higher income neighborhoods, and architecturally insensitive design treatments of rail stations [citations]. Only two studies, in fact, found that BART exerted a positive influence on property values. One identified a positive effect on properties located within 1,000 feet of a BART rail station [citation]. The other, an impact study conducted 20 years after BART began operation, found a premium on homes with good access to the BART system [citation]. *The real contribution of this particular study, however, may be that it identified an effect two decades after BART service began; in other words, there probably is a significant time lag involved in the capitalization of transportation improvements* [citation].” (DART study, pp. 3-4, italics added.) Similar findings were true for Atlanta, where “researchers discovered that rail transit had virtually no impact on property values.” (DART study, p. 4.) Studies of Miami’s Metrorail system and Portland’s MAX rail transit system reached similar conclusions. (*Ibid.*)

The DART study listed the various explanations that had been advanced for the “weak and inconsistent empirical relationship identified between rail transit and property values” as: (1) the basic theoretical construct that rail transit improves accessibility and therefore affects land values and use is ill-conceived, or (2) rail systems “*simply haven’t been given sufficient time to impact adjacent properties*. The case here is that *the durability of capital stock implies long time lags in land-market responses to changes in the transportation system* [citation]. *This would appear to be the case with San Francisco’s BART system, if recent research on its impacts mentioned above is to be believed* [citation].” (DART study, p. 5, italics added.) The DART study also identified a “persistent criticism of the empirical research . . . has been that *the methodological complexities involved in isolating the effect of any one factor on land values over several*

years make it unlikely that impacts can be measured, even if they exist [citation].” (Id. at p. 6, italics added.) The DART study concluded: “In summary, the empirical research of the past two decades—though not without flaws—reveals that the capitalization effects of rail transit systems are not easily generalizable. Most of the evidence suggests that rail transit exerts no influence on land use and value; where evidence of a positive influence has been uncovered, it is highly localized and contextual. Indeed, the murkiness of this relationship has prompted some researchers to conclude that the greatest potential for recouping private value from public investment in transportation systems lies in transit joint development (Cervero and Landis 1995).” (DART study, p. 7.)

The DART study discussed “transit joint development,” which entails a cost or revenue sharing arrangement between a public transit authority and a private developer. “[F]or the right to develop the property above, below or adjacent to a transit station, the developer either assumes some of the construction cost of the station or makes a direct payment to the transit authority. For the developer, the advantage lies in the higher rents and/or occupancy created by proximity to a transit station (capitalized accessibility).” (DART study, p. 7.) Such development projects have been completed in more than a dozen U.S. cities. (*Id.* at p. 8.) However, only two empirical studies had been published by the date of the DART study in 1999: The older study (in 1983) concluded that “joint development projects significantly benefited land use and site rents only in the presence of a healthy regional economy and a supportive governmental framework (i.e., permissive zoning to allow higher densities).” (DART study, at p. 9.) The second study, a 1994 study by Cervero, was more comprehensive and examined a “variety of office market indicators over an 11-year period (1978-1989) for selected commercial properties located at or near 3 transit stations in Washington, D.C. (Ballston, Bethesda and Silver Spring) and 2 stations in Atlanta (Arts Center and Lenox) (Cervero [study] 1994). Most importantly, this research found office rents at or near the stations to be 15 percent higher than rents for comparable properties elsewhere. Put differently, joint development projects added roughly \$3 per gross square foot to annual office rents. This study also concluded that joint development projects encouraged comparatively lower vacancy

rates, shorter lease-up and re-lease times, and received better terms from lenders because of their more profitable and stable income streams. [¶] *Obviously, on the basis of just two empirical studies of joint development only a tentative conclusion that such projects positively impact land values or use is warranted. Moreover, researchers who have studied that issue have been careful to note that past successes have relied on a confluence of several conditions that are not always easily repeated, the most important of which is a robust commercial real estate market [citation].*” (DART study, pp. 9-10, italics added.)

With respect to the actual impact upon Dallas area land values located near DART stations, the DART study found the jump in taxable valuations between 1994 and 1998 for property around DART stations was about 25 percent greater than in neighborhoods not served by DART rail, which “*suggests that the light rail system is having a positive economic impact.*” (DART study, p. 15, italics added.) Similar results were found looking at land values. “[T]he average appreciation around DART stations was double that in the non-DART rail neighborhoods.” (*Ibid.*) Impacts on commercial real estate occupancy rates and rents for properties close to DART stations were also analyzed. The study summarized that “[b]y these measures, proximity to DART LRT stations appears to be a plus for most classes of real estate, especially Class A and C office buildings and strip retail.” (*Id.* at p. 1.) “Community retail properties—those with at least one major retail anchor—experienced a slight *decrease* in occupancy between 1994 and 1998 while rental rates jumped 29 percent. [Italics added.] Neighborhood retail establishments—convenience stores, personal service businesses, and supermarket retailers—saw occupancy and rental rates rise by 3.3 percent and 6.2 percent respectively. North Park, the only regional mall currently served by DART LRT, remained 100 percent occupied during the 1994-1998 period while rents increased 20 percent.” (*Id.* at p. 19.) Cervero could not say whether or in what respects the North Park mall referenced in the DART study was comparable to Tanforan.

Cervero did not rely upon studies of the effect of BART’s presence in Bay Area communities of Richmond, El Cerrito del Norte and Bayfair, which he termed

“comparable regional economies[,] but these were much more sagging, stagnant commercial real estate corridors. BART’s presence could not turn that around, that’s why it did not draw from those studies. It would have been really foolhardy for me to weigh those studies.”

Among the BART studies that Cervero considered, but upon which he did not rely, was the “Landis study”³⁹ that found virtually no effect on commercial property values from the impact of transit. He discounted it because it was based on asking rents—a measure “many feel was a poor indicator of value” and because it was performed upon data from the early 1990’s when the Bay Area was in a fairly deep recession in the real estate market.

The studies by and large concluded that whether retail specific or not, benefits to land values from proximity to rail transit are uncertain, far off into the future, and, if anticipatory, often disappear.

Cervero acknowledged that “we don’t have the perfect study out there. What one has to do is weigh as good as one can many comparable studies and look across a collection of findings and use one’s best judgment and make a professional informed opinion on impact, and that’s exactly what I did. [¶] So this is not perfect.” Many of the sites he considered “have far more relevance and comparable to this particular corridor and this project than Bayfair or El Cerrito del Norte. [¶] I also weighed Pleasant Hill. I could continue. I also weighed The Crossings project in San Mateo County, which has been massively improved at the CalTrain’s Mountain View station. Those were all factors I weighed along with the Ballston station, these were situations where there is much better comparability to this particular project, not knowing what the effects would be since BART is there. All we can do is estimate them based on the best empirical evidence available, weighing many factors.”

³⁹ J. Landis and D. Lotzenheimer, *BART @ 20: BART Access and Office Building Performance*, Institute of Urban and Regional Development, University of California at Berkeley, Working Paper 648, 1995.

(b) *Not an isolated effect.* Cervero opined that the land value “premium is going to be higher for commercial retail, evidence tells us, because they can reap the biggest profit. . . . So it’s the land, how it’s zoned and what it’s poised to be which is really going to determine more or less the land values. [¶] Now what can interact with that is if there is an ambitious effort to enhance the environment through improved infrastructure as part of the redevelopment effort, if there’s landscaping, if there’s efforts to improve circulation and enhancing, those are factors which interact with the proximity of land itself to have even proportionally greater effect.” He acknowledged that such factors might or might not be the direct result of transit. “Transit many times is a trigger which leads to a massive redevelopment program. [¶] . . . [¶] Transit is many times one of many factors. *All the evidence tells us many times that transit in and of itself will not have anywhere close to the land use effect that transit in combination with other supportive infrastructure improvements and other kind of master planning of improvements around stations. So it’s—it’s something which can interact with all these other programs to have proportionally even greater effect.*” (Italics added.)

Cervero stated that he relied upon studies of other areas more comparable to the Tanforan area. These involved mixed use projects and joint transit development. “I relied on Atlanta, the Atlanta Station. I relied on Ballston [served by the Washington D.C. Metrorail]. [¶] The other place I would cite that I relied on is again the Mountain View station. You look at that station, the CalTrain station ten years ago, you had a dying shopping [mall] that actually got vacated. When they opened up the CalTrain station that whole thing has been converted to a mixed use, The Crossings project, which is one of the most healthy master plan real estate projects around. It has housing but it also has retail commercial as well.”

Cervero also agreed that the land value premiums associated with retail usages near transit depend upon equally close proximity of office and/or housing developments, stating his opinion that “retail in and of itself depends on customers who are largely residents and employees. So where you have them within reasonable proximity as part of a market shed, yes, it is going to depend on that.” He stated that he did not think it

possible to find an environment where there is only retail close to transit in a healthy suburban economy and that he had relied upon “empirical studies that define an impact zone and associated the premium of proximity to a regional rail system to commercial real estate properties.”

(c) *Anticipatory effects.* Cervero acknowledged that “many times the biggest increment is recorded even prior to the opening of the system.” He stated that studies “many times have documented you can show some of the significant appreciation has occurred in anticipation and by the time it opens oftentimes, not always, but a number of times much of the premium increase has already been incurred.” He stated that where there has been a sales transaction, tracking shows “that some of the biggest gains have happened a year or so in advance of opening.” The BART extension was first planned in the early 1990’s. Cervero stated that he “would anticipate if there was a sales turnover that the values would reflect what is anticipate—is going to be capitalized over the full use of life of the property.” However, Cervero did not attempt to determine any anticipation-based land value premiums along with the San Francisco International Airport extension line for BART. He focused his analysis on what he believed would be “the land value premium *within two years of the opening of the system.*” (Italics added.) He opined one could base the land value premium on rents, which “should express that one or two years downstream once the system’s in place, or sales transaction data. But until . . . there’s actual BART there tenants are not going to pay a rent premium so it’s not going to be expressed in rents.” He stated that he “would rather suspect” that the land value premium would be reflected real estate sales transactions, if Tanforan or “parcels around there” were sold, the “real estate sales transaction would reflect the fact that people are anticipating BART in one to two to three years time will significantly enhance the value of its parcel. So it would be reflected currently in sales transaction data, it would not be reflected currently in rental rates of those project[s].” However, Cervero had not sought appraisal data or comparable sales data for retail commercial properties in the region to confirm or check his conclusion as he had not had time to do original research on this project.

Cervero disavowed relying upon a number of studies describing the impacts of BART on Bay Area land values. He stated he relied on the DART study's analysis of DART LRT, but the same study's analysis of literature relative to BART concluded: "Most of the evidence suggests that rail transit exerts no influence on land value," that any positive influence is "highly localized and contextual," and that "joint transit development" offered the greatest potential for benefit. (DART study, p. 7.) Studies suggesting benefits to property from proximity to rail transit indicated benefits accrued primarily to residential and commercial office properties and where there was joint transit development, not shown to be occurring with Tanforan BART.

2. *Trial court acted within its discretion in excluding Cervero's opinion.* The trial court's exclusion of Cervero's testimony as unduly "speculative" was supported on this record.

SamTrans argues that *Continental*, *supra*, 16 Cal.4th 694, is on point and that the Supreme Court determined that the same types of benefits at issue here were admissible. In *Continental*, the alleged benefit arose from an increase in value of *office buildings* near a light rail line, as a result of the proximity to public transit stations and the operation of the line. (*Id.* at p. 699; see 1 Matteoni & Veit, *supra*, § 5.34, pp. 280-283.) The MTA had sought to introduce evidence that the value of office buildings in other localities increased as a result of their proximity to public transit stations, as well as expert testimony that the value of the owner's property would increase by several million dollars as a result of the operation of the line. The trial court ruled the evidence inadmissible on the ground that proximity to the transit station was not a special benefit because it was shared by numerous properties in the vicinity. (*Continental*, at p. 699.) The Supreme Court reversed and remanded for a new trial on the severance damages issue, concluding that evidence of "general benefits" that were "reasonably certain, immediate and nonspeculative" were admissible. (*Id.* at pp. 717, 718, 722.) The court also concluded that "the increase in rental value that the MTA sought to prove appears to be no more speculative or uncertain, and no less immediate, than the decrease in rental value that *Continental* was permitted to prove." (*Id.* at p. 717.) *Continental* had presented as

evidence that the effects of the light rail operations on “perceptions of view, light and noise within its building would lower expected rents.” (*Ibid.*)

This comparison of benefits and detriment to the same type of properties (commercial office buildings) is closer than the attempted comparison here of effects on commercial office properties and a large retail mall property. More importantly, there is no indication in *Continental*, as there is here, that the evidence upon which the transit authority relied did not support the experts’ conclusions.

In *Continental, supra*, 16 Cal.4th 694, the Supreme Court did not determine what type of benefits would qualify as “neither conjectural nor speculative.” (*Id.* at p. 718.) As observed by Matteoni and Veit: “For damages or benefits not to be ruled speculative or remote, they must flow directly from the taking or public improvement [(*Continental*, at p. 718)], even though other properties in the area of influence of the project are similarly affected. There must be a reasonable effect on market value. As stated by the court, the benefits must be ‘reasonably certain, immediate and nonspeculative.’ ([*Continental*, at p. 717]; [citation].)” (1 Matteoni & Veit, *supra*, § 5.34, pp. 281-282.) “[T]he court still has a responsibility to determine the probative weight of the evidence. It should not automatically give any asserted general benefits to the jury to factually consider whether they are conjectural or speculative.” (*Id.*, § 5.37 at p. 286.) “The court acts as the gatekeeper to exclude any testimony that is speculative or conjectural.” (*Id.*, § 5.3, p. 237.)

(a) The court could properly determine that Cervero’s opinion was not supported by the studies upon which he relied. Those studies involved primarily commercial office space or residential development. That alone would not render the studies irrelevant on the issue, particularly in light of Cervero’s view that the “magnitudes of impacts between office and retail have not been shown to be demonstratively much different.” Nevertheless, the court could consider that Cervero’s opinion was actually undermined by his reliance upon the Falcke and Damm studies, which he characterized as involving retail properties and as the “two studies which found unmistakable benefits.” The court could so determine in light of Cervero’s later acknowledgment that these studies did not

or might not have included retail properties or regional shopping malls in their analyses and because the two studies generally concluded that the anticipated increase in property value attributable to BART failed to materialize or disappeared (Falcke study), and that even the *anticipated benefits* of the impact of rail transit on property values that were the focus of the Damm study were found to be “at most, indirect and limited to areas characterized by other favorable factors” (DART study, p. 4.)

(b) Adding to the speculative nature of the benefits found by Cervero is the fact that the studies upon which he primarily relied (the Falcke, Damm and DART studies) acknowledge that measurable benefits, if any, to the properties involved were primarily “anticipatory,” occurring well before completion and operation of the project. Cervero, and the studies upon which he relied, acknowledge that most land value premiums arising from a project occur before construction and operation of the projects. He did not attempt to eliminate these anticipatory benefits from his calculation of benefits attributable to the BART project at Tanforan.

Evidence of increases in value of the remainder attributable to anticipatory benefits is not admissible. This has been the traditional rule with respect to special benefits. “ ‘Special benefits have traditionally been *limited to increases in value that occur after the construction and incident to the public use of the improvement.*’ [Citation.] In the author’s judgment, the rule would remain the same for general benefits.” (1 Matteoni & Veit, *supra*, § 5.33, p. 280, italics added.)

Section 1263.440, subdivision (b), provides: “The value of the remainder on the date of valuation, excluding prior changes in value as prescribed in section 1263.330,^[40] shall serve as the base from which the amount of any damage and the amount of any benefit to the remainder shall be determined.” This subdivision makes clear that the

⁴⁰ See footnote 30, *ante*, at page 70. The Law Revision Commission Comment to section 1263.330 explains that this section codifies prior case law holding that, “in general, increases in the value of the property caused by the project may not be included in the compensation.” (Cal. Law Revision Com. com., 19A West’s Ann. Code Civ. Proc. (1982 ed.) foll. § 1263.330, p. 61.)

value of the remainder in the original condition, unaffected by any enhancement or blight, shall be used as the basis to compute both damages and benefits. (Cal. Law Revision Com. com., 19A West's Ann Code Civ. Proc., *supra*, foll. § 1263.440, pp. 83-84.)

(c) Owners argued that any benefits attributable to the operation of the BART project were not sufficiently “immediate” to satisfy the mandate of *Continental, supra*, 16 Cal.4th at page 717. Cervero acknowledged that the land value premium he found would occur “within two years of the opening of the system.” He opined one could base the land value premium on rents, which “should express that one or two years downstream once the system’s in place, or sales transaction data. But until . . . there’s actual BART there tenants are not going to pay a rent premium so it’s not going to be expressed in rents.” He also stated his view with respect to the interplay of anticipatory benefits and post operation benefits: “it’s best to inform clients what the impact is . . . after the fact so that’s what I did. My reports refer to several years after the fact.”

SamTrans counters that the statutes specifically state that any expected “delay” in realizing project benefits may be factored in to the benefits analysis. Section 1263.440, subdivision (a), provides that severance damages and offsets for benefits shall be calculated so as to take into account any delay in the schedule for completing the project. “Thus, [section] 1263.440[, subdivision] (a) provides for ‘discounting’ of both damages and benefits, and there are at least three possible dates to consider: the date of judgment or possession, the date of construction, and the date of use.” (1 Matteoni and Veit, *supra*, § 5.17, p. 256.)

Subdivision (a) of section 1263.440 does not, however, relieve the trial court of the obligation to determine whether the realization of project benefits is sufficiently “immediate” to render such benefits nonspeculative. Although Cervero opined that benefits would be realized within two years of the opening of the BART station, the DART study upon which he relied indicated that the land value premiums attributable to such rail transit projects found that studies had identified “an effect two decades after BART service began; in other words, there probably is a significant time lag involved in

the capitalization of transportation improvements [citation].” (DART study, p. 4.) The DART study also recognized that other studies contained similar findings for Atlanta, where “researchers discovered that rail transit had virtually no impact on property values” (DART study, p. 4), for Miami’s Metrorail system, and for Portland’s MAX rail transit system. (*Ibid.*)

The trial court could determine that the post-operation benefits found by Cervero were not sufficiently “immediate” to render them admissible where they would not be realized until at least two years after the projected 2002 opening of the project—more than three years after the January 1999 valuation date.

SamTrans contends that to exclude this testimony was to fail to treat evidence of detriment and benefits “evenhandedly,” one of the virtues identified by *Continental*, *supra*, 16 Cal.4th at page 717, in overturning the distinction between special and general benefits to allow general benefits testimony. SamTrans argues that Betts’s testimony relating to highest and best use of the property and damages for loss of GLA in an expanded center was based upon the same expansion of the center as Cervero and Sedway’s testimony relating to benefits.

The treatment of general benefits to be set off against damages is “evenhanded” insofar as neither the damages nor the benefits of the project may be speculative or conjectural. Because the studies upon which Cervero relied do not support his ultimate opinion on benefits, the question of “evenhanded” treatment of damages and benefits is not at issue. Moreover, the evidence presented by Owners showed that damages from the loss of parking occasioned by the taking were immediate and neither speculative nor conjectural. The benefits found by Cervero were projected to be realized more than three years thereafter and were speculative at best. We see no lack of evenhandedness in the court’s treatment of damages and benefits evidence here and no abuse of discretion.

(d) Finally, Cervero’s testimony and the studies upon which he relied made clear that even where there was some evidence of an increase in property value attributable in part to rail transit, those benefits were the result of the *joint operation of many influences*. The studies acknowledged that it was difficult to isolate the factor of proximity to transit

itself; rather, those studies finding positive effects of rail development attributed that impact to the confluence of multiple influences.

One of the main projects relied on by Cervero as an example of accelerated land use conversion triggered by rail transit was The Crossings redevelopment in the City of Mountain View. The site had been occupied previously by a largely *vacant* shopping mall surrounded by a huge parking lot. The developer “purchased the site and, working with the city, has transformed it into a vibrant mixed-use, pedestrian-oriented project focused around the train station.” This project involved housing, as well as retail, a multiplex theatre and entertainment center. Cervero’s report pointed to a number of joint-development projects wherein public and private developers partnered to redevelop properties into multiple use commercial office, retail, and residential districts. Cervero weighed this potential for joint development as one of the “key factors” in arriving at his estimate.

During his deposition, Cervero listed a number of factors that could interact with rail transit to result in benefits. These included: zoning, what development is planned, whether “there is an ambitious effort to enhance the environment through improved infrastructure as part of the redevelopment effort, if there’s landscaping, if there’s efforts to improve circulation and enhancing, those are factors which interact with the proximity of land itself to have even proportionally greater effect.” He opined that “[t]ransit many times is a trigger which leads to a massive redevelopment program. [¶] . . . [¶] Transit is many times *one of many factors*” (italics added) and, “that transit in and of itself will not have anywhere close to the land use effect that transit in combination with other supportive infrastructure improvements and other kind of master planning of improvements around stations.”

The DART study noted that, as of 1999, only two empirical studies examining joint transit development had been published. The first, published in 1983, concluded that “joint development projects significantly benefited land use and site rents only in the presence of a healthy regional economy and a supportive governmental framework (i.e., permissive zoning to allow higher densities).” (DART study, p. 9.) The second, by

Cervero and published in 1994, examined “office market indicators” for selected commercial properties located at or near three transit stations in Washington D.C and two stations in Atlanta and found that joint development projects added roughly \$3 per gross square foot to annual office rents. (*Id.* at p. 9.) Importantly, the DART study concluded, with respect to joint-development, that on the basis of just two studies “only a tentative conclusion that such projects positively impact land values or use is warranted. Moreover, researchers who have studied that issue have been careful to note that past successes have relied on a confluence of several conditions that are not always easily repeated, the most important of which is a robust commercial real estate market [citation]. Put differently, regardless of quality no project can overcome adverse market conditions. Other factors revolve around ‘culture,’ that is, the entrepreneurial capacity of the transit agency, the willingness of private developers to partner with the public sector, and so on.” (*Id.* at p. 10.)

Consequently, the benefits Cervero ascribed to the BART project would not be attributable solely to the presence of the project, but to a host of other factors, including land use decisions by Owners, developers, governmental entities and others. Although Owners presented evidence that the highest and best use of the property would be an expanded shopping center, the court could reasonably conclude that joint development of the type envisioned by Cervero and described in the studies upon which he relied was at best speculative.

We conclude there were ample grounds for the trial court to conclude that the opinion evidence presented by Cervero was unduly speculative and conjectural and that the project benefits he opined would increase the land value of the remainder were not “*reasonably certain, immediate and nonspeculative benefits.*” (*Continental, supra*, 16 Cal.4th at p. 717, italics added.)

We are not here holding that on this record the trial court could not have exercised its discretion to allow the jury to weigh the expert’s testimony. However, because many of the key studies upon which his opinion was based either did not support that opinion or contained such significant caveats as to undermine that opinion, the trial court acted

within its discretion in excluding Cervero's testimony on the ground that the benefits he attributed to the BART project were neither "reasonably certain," nor "immediate," nor "nonspeculative."

D. Refusal to give a curative instruction after exclusion of Owners' benefits expert

SamTrans contends the trial court committed reversible error when it granted SamTrans's pretrial in limine motion to exclude the benefits testimony of Owners' expert Walter Kieser,⁴¹ but refused to instruct the jury that " 'both parties admit the existence of benefits and that [the jury] can find benefits in any amount not to exceed the value of said benefits offered by plaintiffs' experts.' "

Kieser was listed in Owners' expert witness list as providing expert testimony "as to the benefits, if any, BART will confer on the Tanforan Park Shopping Center and/or the stores contained therein. . . ." It was anticipated that Kieser would provide rebuttal testimony to Sedway's opinion that retail sales would increase by \$13.2 to \$23.1 million in additional sales annually due to the project and to Talmage's conclusion that the benefit to the property from the BART project was \$1,890,052. The statement of valuation prepared by Owners' valuation expert Betts relied upon Kieser's opinion of increased retail sales to conclude that the "remainder . . . will accrue Benefits in the amount of \$140,000." In an attachment to Betts's valuation statement, he explained he arrived at such sum through capitalizing the income increase found by Kieser, stating: "3. It is possible that these changes [resulting from extension of the BART line to the San Francisco International Airport area and the San Bruno station] might translate into increased sales for stores in the Center, which could translate into increased store rents and/or values. [¶] 4. The sales issue has been studied by Walter Kieser, who has concluded that the total increased sales will be quite small, in the area of \$406,000 per year."

⁴¹ It is unclear in the record whether the proper spelling is Kieser or Keiser. The witness's deposition contains both spellings. The parties refer to him as Kieser in their briefs and we will do the same.

SamTrans successfully moved to exclude the testimony of Owners' expert Kieser as a discovery sanction on the ground that Kieser's opinion testimony was primarily based upon matters Owners had failed to disclose.⁴² In its motion, SamTrans recognized that it was "in an unusual situation with respect to this challenge. The testimony of Mr. K[ie]ser actually offsets the amounts of severance damages due to defendants as a result of the project. Exclusion of his testimony would effectively result in a higher value of severance damages for [Owner] defendants. Based on the opinion of K[ie]ser, the defendants clearly agree that there will be a benefit to the remainder as a result of the project. Plaintiff, however, should not be penalized for the misconduct of defendant Sears. ¶ To prevent an unfair impact on plaintiff, plaintiff urges the court to exclude the testimony of Mr. K[ie]ser as to an actual dollar figure for benefits for the reasons stated above. In addition, the court should order that defendants cannot thereafter deny the existence of benefits to the remainder. Finally, the jury should be instructed that both parties admit the existence of benefits and that they can find benefits in any amount not to exceed the value of said benefits offered by plaintiff's benefits experts. Plaintiff can fashion no other remedy which would be fair and just in light of the circumstances set forth above."

The trial court granted SamTrans's motion to exclude Kieser's testimony, but refused to give the requested curative jury instruction. SamTrans sought clarification of the order and again requested a curative jury instruction. In response to a question from the trial court, counsel for SamTrans and for Owners conceded that after excluding Kieser's opinion, the only benefits testimony left in the case involved direct benefits of the improvements and that there was no other testimony regarding benefit with regard to retail sales. Thereafter, Owners revised their valuation statements by taking out any reliance upon Kieser's opinion regarding increased retail sales. Betts eliminated his

⁴² SamTrans described this abuse as: "Sears had engaged in bad faith discovery by redacting a document and then providing the unredacted copy of the same document to Mr. K[ie]ser who in turn utilized it as a basis for his opinion on benefits." Owners at all times denied any discovery abuse.

benefits offset of \$140,000. SamTrans again requested a curative jury instruction. In letter briefs filed at the instruction of the court, SamTrans suggested “that the court issue an instruction to the jury that they must reduce the amount of damages to Sears by an amount of at least \$138,000. Defendants’ admission of benefits in the amount found by K[ie]ser should serve as a floor in the amount of benefits to be reduced from the damages sought by Sears.” Alternatively, SamTrans argued the court could allow benefits experts Sedway and Cervero to testify. The trial court denied SamTrans’s request.

SamTrans then requested the court state its reasons for denying the instruction—whether it was ruling as a matter of law that there were no benefits—and upon what basis the court had eliminated Kieser’s testimony. The court stated that it was not a factual or legal finding, but a “discovery sanction.” Responding to SamTrans’s argument that the sanction did not hurt the defendant discovery abusers, but hurt SamTrans, the court stated: “It is unfortunate that there does not seem to be a remedy that at least is acceptable to the court. I don’t mean to be so arrogant about it. There doesn’t seem to be a remedy for this situation other than to eliminate the testimony of this one witness as the basis because there were discovery abuses. [¶] . . . I will not secondguess why the motion was brought. I made the call as I saw it based on what was in front of me.”

On appeal, SamTrans maintains that because the court excluded the opinion testimony of SamTrans’s retail benefits experts Cervero and Sedway as speculative, and because it excluded Kieser’s testimony as well, there was no evidence of retail benefits, despite Owner’s concession that the project would result in *some* retail benefit. It argues that in refusing to issue the “curative instruction” it requested, the court rewarded Owners for their discovery misconduct. The result, it urges, was unfair.

Owners respond that SamTrans was not entitled to such “curative instruction.” They argue that they did *not* admit the existence of retail sales benefits attributable to the project. They point to Kieser’s deposition testimony wherein he explained that he did not believe one could draw a firm or fixed relationship between BART ridership and expenditures at the center. He stated that for purposes of the benefits analysis he had “presumed” the center was fully occupied, so that he could not potentially undercount

sales, but that he had not attached any year or cause to full occupancy. He expressed his view that there was “some possibility” that access to Tanforan will attract new shoppers and the question he explored was—“once you create access to Tanforan by . . . BART, to what extent does it have the potential for expanding the trade area,” and “how many households are in this area that might be influenced or might possibly be attracted to make that kind of trip?” His testimony is rife with the terms “possibility,” “may” and “might.” He explained, “Again, this is a benefit-of-the-doubt kind of argument.” He described his methodology as “[w]e estimated our best professional opinion about the topic of how much increased sales might occur. . . .”

SamTrans cites the statute providing for discovery sanctions (former § 2023, subd. (b)(2))⁴³ and several cases that affirm the trial court’s imposition of sanctions in particular cases and acknowledge that the trial court has discretion to “tailor” sanctions as appropriate. (See *Vallabona v. Springer* (1996) 43 Cal.App.4th 1525, 1547-1548.) All the cases cited by SamTrans affirm the trial court’s imposition of discovery sanctions as within the trial court’s exercise of discretion. No case cited to us holds the trial court erred in *failing* to impose a particular type of discovery sanction. Clearly, the court had broad discretion with respect to the imposition or refusal to impose a particular discovery sanction. That the court *could have* imposed an issue sanction within the exercise of its discretion does not mean that it was *required* to do so.

As recognized in *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, relied upon by SamTrans, “Our Supreme Court recently examined the broad range of sanctions set out in that statute for a misuse of the discovery process: ‘The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing

⁴³ The discovery sanctions provisions of former section 2023 are currently found in section 2023.030 (effective July 1, 2005).

designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party.’ (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12.) ‘In choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason. [Citation.]’ (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988; see also *Vallbona v. Springer*[, *supra*,] 43 Cal.App.4th 1525, 1545 [discovery sanctions reversible only for arbitrary, capricious, or whimsical action]; *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431-432 [complaining party must show how and why court’s action constituted abuse of discretion].)” (*Juarez v. Boy Scouts of America, Inc.*, at pp. 388-389.) “ ‘[T]he issue before us is not what sanction we would have imposed, but whether the trial court abused its discretion in ordering dismissal as a sanction.’ [Citation.]” (*Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 929.)

Here, several factors support the court’s refusal to impose an issue or evidence sanction of the type requested by SamTrans. SamTrans does not complain that the court excluded Kieser’s testimony. The doctrine of invited error would preclude it from so doing in any event. (*Watenpaugh v. State Teachers’ Retirement* (1959) 51 Cal.2d 675, 680; Eisenberg et al., *Civil Appeals & Writs*, *supra*, ¶¶ 8.244-8.245, pp. 8-140 to 8-141.) Rather, SamTrans complains that the trial court refused to instruct the jury that retail benefits were conceded in an amount not to exceed SamTrans’s evidence of such. Of primary importance is the fact that the court’s exclusion of the benefits testimony of Cervero and Sedway, left SamTrans with *no retail benefits evidence* to present to the jury. The court’s exclusion of Kieser’s testimony left an evidentiary void that would not support the instruction sought by SamTrans. Moreover, once the opinion testimony of Cervero and Sedway was excluded, it is unlikely that Kieser would have been called by Owners. Had the court not excluded his testimony and had SamTrans called him, Kieser’s “benefit of the doubt” type testimony was not likely to assist SamTrans in establishing retail benefits. SamTrans could have, but did not, seek monetary sanctions

for the discovery abuse. SamTrans argues that it was “unfair” to penalize it for Owners’ discovery abuse. However, the trial court could determine, as it did, that in the circumstances there was no “fair” result and that it would be less fair to instruct the jury that benefits had been established. The trial court did not abuse its discretion in failing to instruct the jury as requested by SamTrans when it excluded Kieser’s retail benefits opinion upon SamTrans’s motion.

In light of the foregoing, we also conclude that the trial court did not err in instructing the jury that no evidence of retail sales benefit had been provided and that it therefore could not reduce its severance damage award by any benefit related to a potential increase in retail sales.

VI. Admission of Replacement Parking Testimony

SamTrans moved in limine to exclude “evidence re BART’s alleged obligation to provide replacement parking.” Its motion was aimed at excluding evidence that environmental review documents discussed one-for-one replacement parking as a means of mitigating the loss of overflow parking and testimony that BART real estate acquisitions manager Arnold had confirmed that the environmental impact documents included one-to-one parking replacement as a mitigation measure. SamTrans sought to exclude this evidence on the grounds that the mitigation measures were never adopted and that they were not part of the “project as proposed” pursuant to section 1263.450. SamTrans also argued that Arnold’s testimony was inadmissible pursuant to Evidence Code section 1523, as oral testimony regarding the content of the written EIR, and that the license agreement allowing BART early access to the property did not include any provision regarding parking. Following a hearing, the court initially granted the motion excluding this evidence.

Thereafter, during opening statement, counsel for SamTrans developed the theme that the Owners’ concerns about the loss of parking were not genuine. Counsel argued that Owners had *lobbied for* BART to come to Tanforan, but had developed a “new story for trial” regarding adverse parking impacts from BART. Among other things, SamTrans’s counsel stated: “What’s really interesting about this is, they are

acknowledging that BART originally was going to be constructed on the other side of Huntington Avenue, . . . not inside the shopping center. They lobbied to get BART to come into the shopping center to build that station exactly where you see it now. They spent money on somebody to have them come up with proposals to convince BART to locate . . . inside the . . . Tanforan Shopping Center area. [¶] You're going to have an opportunity to weigh that fact against their current claim that this is going to cost \$50,000,000, this terrible decision by BART to locate there."

SamTrans's counsel emphasized the statement in a Tanforan business plan that Tanforan had successfully negotiated to bring BART to the center. Counsel also referred to the license agreement by which Owners granted BART early access and to the MOU among Owners agreeing that required parking ratios would be reduced during this period, as support for SamTrans's claim that replacement parking was neither expected nor needed.

Thereafter, Owners moved to allow former Tanforan owner and developer Nicholas's testimony that Arnold had promised that BART would replace parking one-for-one in return for early access, in order to refute the false impression created by SamTrans's opening statement about why Owners were so cooperative with BART and as evidence of what Owners understood in the business plan to be a "successful negotiation." Owners desired to show that they had always been concerned with BART's possible adverse impact on parking and had agreed to execute the license allowing BART early access only because of the representations that parking would be replaced on a one-for-one basis and that parking would not be an issue. Owners also argued that such evidence was relevant to counter SamTrans's claim that the Owners did not need, use, or want all the parking they had before BART's arrival.

Following an in limine hearing, the trial court ruled the testimony admissible, noting that its previous ruling had been based "on the EIR issue" alone. The court observed that, although other arguments had been raised, "90 to 95 percent of the argument was based on the EIR documents as opposed to representations that Mr. Arnold might have made [and] his authority to make them and those kinds of issues." The court

concluded that the basis for the previous ruling was “that the EIR and reliance on the EIR documents was not a project as proposed”

The court determined that its previous ruling did not prevent Owners from introducing testimony by Nicholas about representations made to him that parking would be replaced on a one-for-one basis and his state of mind in inviting BART to come to Tanforan.⁴⁴ However, Nicholas was precluded from testifying about the EIR requiring replacement parking on a one-for-one basis.

Three witnesses testified for Owners about the Arnold promise to replace parking one-for-one. Nicholas testified that he had negotiated replacement parking on a one-for-one basis with Arnold as part of the agreement to allow BART early access. Nicholas also testified that “parking is the life blood of the shopping center and we had to have parking replaced. We had to get back what they took and that was my understanding.” Based upon Arnold’s assurances regarding replacement parking, Nicholas recommended to Owners that they approve the license agreement providing early access to BART. Nicholas would not have recommended approval of the license agreement otherwise. Also testifying that they had heard Arnold make such representations were Robert Carr, project manager at Tanforan and former vice president of operations for Hapsmith Company, who had responsibilities for issues related to Tanforan at the time of the BART negotiations, and George Foscardo, Community Development Director of the City of San Bruno.

The trial court denied SamTrans’s motions to strike this testimony, ruling that the issue had been raised in SamTrans’s counsel’s opening statements as to the motive for Owners entering into the early access license agreement and that the testimony was relevant to the dispute regarding the Owners’ willingness to bring BART to Tanforan.

⁴⁴ The court also stated its view that it “believe[d] this is another example [of] one side’s attempt to broaden a ruling on a motion in limine.” Both parties had continually tried to “use[] . . . sometimes narrow rulings on motions in limine to expand them, to cut out greater portions of each other’s case.”

During closing argument, counsel for Owners argued that Nicholas had testified he was concerned about parking if BART moved into the center, that Arnold had represented that BART would replace parking one a one-for-one basis and that was the reason that BART was given early access, and that the MOU was signed so that Owners would not be in violation of the REA. Owners did not argue that Arnold's promise was a binding contract or that the promise obligated BART to provide replacement parking.

The court refused SamTrans's Special Instruction No. 1, seeking to instruct the jury that "BART has no contractual obligation to replace parking on a one-for-one basis and you may not base any damages in this case on any such contractual obligation." The jury did not award damages based upon a one-for-one replacement of parking and Owners did not ask it to. Rather, Owners sought severance damages for parking based on a ratio of 4.62 per thousand, down from a pre-take ratio of 4.94 per thousand.

The crux of SamTrans's claim of error is that the promise of replacement parking was irrelevant to the market value of the property taken and to the issue of severance damages to the remainder. They argue that Owners' motives for granting BART a license for early access could not affect the market value of the remainder; that Arnold had no authority to bind BART to such a promise, if made; and that the license agreement itself states it is the full and complete agreement, superseding any other agreements so that any collateral promises could not bind BART.

SamTrans's argument is misdirected. The issue is not whether BART was or could have been bound by any promise to replace parking. The evidence was admitted to allow Owners to counter SamTrans's claim that the loss of parking did not adversely affect the value of the remainder and that Owners were not really concerned about the impact of the parking loss upon the value of the remainder, as evidenced by Owners' statement in the business plan that they had successfully lobbied to bring BART to Tanforan and that they had willingly entered into the MOU relieving them from their reciprocal parking obligations under the REA. Testimony that they did so only because of assurances that parking would be replaced on a one-for-one basis was relevant to rebut these claims.

Nor are we persuaded by SamTrans’s argument that the evidence was not admissible to rebut SamTrans’s counsel’s opening statement on the ground that counsel’s argument was not evidence. In condemnation cases, the Owners present their case first. Owners were entitled to rebut the theme raised in SamTrans’s opening statements—a statement that referenced specific documents and agreements that were later admitted into evidence—that the remainder had not been damaged by the loss of parking as shown by evidence that Owners wanted BART, Owners had lobbied to bring BART to Tanforan, and Owners had not been concerned about parking loss until trial.

The admission of this evidence was well within the trial court’s discretion. “ ‘Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. [Citations.] Speaking more particularly, it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question. [Citations.] That is because it so examines the underlying determination as to relevance itself. [Citations.] Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.)’ (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)” (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900-901.) As we have determined, this evidence was relevant to counter SamTrans’s claim that the loss of parking did not adversely affect the value of the remainder and that Owners had unreservedly sought to entice BART to the center; it was necessarily relevant to the issue of market value.

VII. Valuation of “Toothpick” and Refusal of Instruction

SamTrans argues the court erred as a matter of law in allowing Owners’ expert Carneghi to value the “toothpick” (all of which was taken) at the same \$35-per-square-foot value he assigned to all of the land being acquired, despite qualitative differences between the “toothpick” and the rest of the property constituting the whole. SamTrans further contends that the court committed prejudicial error when it refused to instruct the jury with SamTrans’s Special Instruction No. 4. We reject both arguments.

The “toothpick” is irregularly shaped and has no street frontage. It is separated from the rest of the center by the “bone.” Carneghi explained that he valued the

“toothpick” at the same value as the rest of Tanforan’s land because the “toothpick” was an integral part of the operation of the center as a whole, was used for parking, and was required to meet the REA parking ratio. Therefore, he opined the total value of the “toothpick” was \$1,696,038. SamTrans’s expert Talmage valued the “toothpick” separately as an irregularly shaped, landlocked parcel that had virtually no utility without the “bone.” He opined that the value of the “toothpick” was \$4 per square foot and that the total value of the “toothpick” was \$207,707. The jury awarded TPSC LP \$462,080 for the taking of the “toothpick.”

SamTrans argues that Carneghi’s valuation “methodology” was flawed and that the court erred in denying SamTrans’s motion to exclude Carneghi’s testimony relating to his methodology for valuing the “toothpick.” We disagree.

Whether each square foot of the parcel condemned has the same value or different “zones of value” was a factual question upon which expert testimony was received. There was a conflict between the experts as to the appropriate value for the “toothpick.” SamTrans’s appraisal expert, Talmage, valued the “toothpick” as a separate parcel, differing in quality from the rest of the property. Owners’ expert, Carneghi, valued the “toothpick” as a part of the whole. Each expert explained why he thought his valuation reflected the market value of the “toothpick.” The resolution of the conflict between these experts as to market value of the “toothpick” was a factual question for the jury. (See *Princess Park*, *supra*, 270 Cal.App.2d at pp. 880-883.)

SamTrans also argues that, regardless whether the court erred in allowing Carneghi to assign the same square-foot value to the “toothpick” as the rest of the property, the trial court erred in refusing to give its Special Instruction No. 4 as follows: “In determining the market value of the parcel condemned it is not proper to attribute a per-square-foot value to defendants’ entire property and then apply the value to the parcel condemned unless each square foot of defendants’ land has the same value. If the parcel condemned is different in quality from the rest of the land, it should be assigned a different value.”

This proposed instruction was taken verbatim from the instruction given to the jury in *L.A. County Flood etc. v. McNulty* (1963) 59 Cal.2d 333, 336 (*McNulty*). The *McNulty* court recognized that there was a conflict in the evidence as to whether a portion of the property taken was worth as much per acre as the remainder of the defendant's land and the instruction was held to correctly state the applicable principles of law. (*Id.* at pp. 336-337.) Consequently, the *McNulty* court rejected the defendant owners' instructional error claim. SamTrans argues that it was error for the trial court in this case to refuse to give this correct instruction. In the circumstances of this case, we believe that the trial court did not err in refusing the instruction. Nor could the absence of this instruction have prejudiced SamTrans.

"Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a [correct] legal proposition. [Citations.]" (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 718 (*Fibreboard*).) "Error cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given. [Citations.]" (*Id.* at p. 719; *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.)

The court could in the circumstances conclude that SamTrans's proffered instruction amounted to improper argument to the jury in the guise of a statement of law, as the instruction unduly emphasized SamTrans's "zones of value" theory of valuation. Had the court given the instruction, it would have effectively instructed the jury to accept SamTrans's valuation methodology and to reject Owners' methodology.

Moreover, the subject of valuation was substantially and adequately covered by the instructions given. The jury was instructed to determine the fair market value of the property solely from the opinions of the witnesses who testified, and that evidence of the witnesses' "reasons for their opinions of value, and all other evidence concerning the

subject property, including your view of it, is to be considered only for the limited purpose of enabling you to understand and weigh the opinions of the witnesses regarding market value, severance damages, and special benefits, if any.” (BAJI No. 11.80.) The jury was further instructed: “You must resolve any conflict in the testimony of the witnesses by weighing each opinion against the others, the reasons given for each opinion, the facts relied upon and the credibility and qualifications of each witness.” (*Ibid.*) The court also gave BAJI Nos. 11.81 and 11.82, which provide detailed explanations of the matters relied on by valuation witnesses and how the jury should consider those matters in weighing the witnesses’ valuation opinions. The instructions given provided the jury sufficient guidance to make its findings upon the valuation issues and enabled the jury to accept SamTrans’s valuation analysis if it found that analysis credible. The court did not err in refusing SamTrans’s Special Instruction No. 4.

Furthermore, even assuming that the court erred in refusing this instruction, SamTrans has failed to demonstrate prejudice. (See *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 655-656.) “The Supreme Court has considered and rejected the theory that an instructional error in a civil case may be inherently prejudicial. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-580 (*Soule*); accord, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 (*Rutherford*).) Instead, *Soule* held that ‘[i]nstructional error in a civil case is prejudicial “where it seems probable” that the error “prejudicially affected the verdict.” [Citations.]’ (*Soule*, at p. 580.) ‘The reviewing court should consider not only the nature of the error, “including its natural and probable effect on a party’s ability to place his full case before the jury,” but the likelihood of actual prejudice as reflected in the individual trial record, taking into account “(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel’s arguments, and (4) any indications by the jury itself that it was misled.” ([*Soule*,] at pp. 580-581.)’ (*Rutherford*, at p. 983.) Reversal for instructional error is warranted only where the reviewing court concludes ‘ “the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13.)’ (*Soule*, at p. 580; accord, *Rutherford*, at p. 983.)” (*Whiteley v. Philip Morris Inc.*, at pp. 655-656.)

Application of this standard convinces us there is no reasonable probability that the refusal to give SamTrans's Proposed Special Instruction No. 4 prejudicially affected the verdict. SamTrans was fully able to introduce evidence regarding the value of the "toothpick" and supporting its conclusion that the "toothpick" was worth less than the rest of the center. As discussed above, other, proper instructions advised the jury how it was to evaluate expert testimony regarding valuation. SamTrans was not prevented from arguing to the jury its theory that the "toothpick" was inferior to and therefore less valuable than the rest of the shopping center. SamTrans's counsel argued that the jury should reject Carneghi's valuation because it was unbelievable that a willing buyer would pay more than one million dollars for "[p]roperty you can't build on, too narrow to park cars on without the use of the bone, that's landlocked, that is unusable, comes to an unusable point, ergo, the name toothpick." Finally, there is no indication the jury was confused or misled by the failure to give the instruction as the compensation it awarded for the take of the "toothpick" was much closer to the value advocated by SamTrans than that sought by Owners.

VIII. Severance Damages Award to Sears

SamTrans contends that the trial court erred in refusing to grant a new trial on the grounds that the jury's award of severance damages to Sears exceeded the amount shown by any expert testimony presented at trial. SamTrans therefore argues that the amount of severance damages awarded to Sears is unsupported by substantial evidence. We disagree.

At the outset of trial, SamTrans sought a separate valuation of the interests of each Owner claiming an interest in the remainder property, pursuant to section 1260.220, subdivision (a), which provides: "Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and

the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefore.”⁴⁵

Owners’ valuation expert Betts testified that Owners suffered severance damages to the remainder attributable to the loss of parking in the total sum of \$30,125,600. Betts allocated to Sears severance damages of \$8,063,400 (\$5,821,500 for loss of 290 parking spaces, \$1,695,000 for increased operating and maintenance costs, and \$66,900 for temporary loss of parking, plus \$480,000 damages for loss of a “Floor Area Ratio Permit Benefit”.) Betts explained at trial that he had arrived at his estimate of Sears’s parking severance damages by allocating 25 percent of the total damages to Sears on the ground that Sears had lost 290 spaces of the total 1,128 spaces lost. The total of 1,128 included 288 spaces lost to the footprint of the new garage. Betts allocated those 288 spaces according to the percentage that each owner had of the spaces lost. He testified that this “[s]eemed the proper way to do it.”

Talmage opined that Sears suffered severance damages in the amount of \$3,534,697.

The jury was instructed in accordance with BAJI No. 11.80, providing in relevant part: “You must determine the fair market value of subject property, the severance damage and special benefits, if any, only from the opinions of the witnesses who have testified. You may not find the fair market value of property, severance damage or special benefits, if any, to be less than or more than that testified to by any witness.

⁴⁵ Section 1260.220, subdivision (b), provides: “The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly. Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, the property or the defendant’s interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding is not affected by the failure to exercise the right to present evidence during the first stage of the proceeding.”

While expert witnesses may express opinions on the issue of value those opinions are worth no more than the reasons and factual data on which they are based.”⁴⁶

The jury returned a verdict awarding severance damages to Owners totaling \$19,326,600. It awarded Sears \$9,296,465 in severance damages. The special verdict found that of this sum, \$9,096,465 was attributable to parking loss.⁴⁷

SamTrans maintains that the award to Sears exceeded the highest value testified to by any expert witness and was therefore excessive and unsupported by substantial evidence. Owners counter that the total severance damages award was well within the limits of the expert testimony and that the allocation to Sears was supported by the record as a whole.

SamTrans relies upon *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865 (*Aetna*), as support for the general rule that the jury must determine the fair market value of the subject property only from the opinions of qualified witnesses and the property owners and “may not disregard the evidence as to value and render a verdict that either exceeds or falls below the limits established by the testimony of the witnesses.” (*Id.* at p. 877.) The *Aetna* court affirmed the trial court’s grant of a motion for directed verdict for plaintiff homeowners in an inverse condemnation case, where the city had offered no evidence on damages, but had relied on cross-examination of plaintiffs’ witnesses to convince the jury that their damages were less than claimed. (*Aetna*, at pp. 876-878; but see *Marshall v. Department of Water & Power* (1990)

⁴⁶ The jury was also instructed with the balance of BAJI No. 11.80: “Evidence which has been received from witnesses of the reasons for their opinions of value and all other evidence concerning the subject property including your view of it, is to be considered only for the limited purpose of enabling you to understand and weigh the opinion of the witnesses regarding market value, severance damage and special benefit, if any. [¶] You must resolve any conflict in the testimony of the witnesses by weighing each opinion against the others, the reasons given for each opinion, the facts relied upon and the credibility and qualifications of each witness.”

⁴⁷ The severance damages attributable to parking loss were awarded as follows: \$346,532 to TPSC LLC; \$9,096,465 to Sears; \$7,173,212.40 to Target/Sneath; and \$710,390.60 to TPSC LP.

219 Cal.App.3d 1124 [jury free to disbelieve evidence presented by plaintiff regarding substantial loss and to award \$1, even though condemner presented no counter evidence].) The *Aetna* court approved the application of BAJI No. 11.80 and the holdings in *Redevelopment Agency v. Modell* (1960) 177 Cal.App.2d 321 (*Modell*) and *People ex rel Department of Public Works v. McCullough* (1950) 100 Cal.App.2d 101 (*D.P.W. v. McCullough*). (*Aetna*, at p. 877.)

In *Modell, supra*, 177 Cal.App.2d 321, the jury awarded damages below the lowest sum to which any expert had testified. The appellate court reversed, holding such award was contrary to the evidence. It rejected the department's claim that the award was supported because one expert had arrived at a figure lower than the jury award using a cost approach calculation where that expert had concluded such approach was "unreliable and not applicable" in the circumstances and had arrived at a higher final opinion of fair market value. (*Id.* at p. 326.) In *D.P.W. v. McCullough, supra*, 100 Cal.App.2d 101, the appellate court affirmed the trial court's grant of a new trial where the damages awarded were higher than those to which any expert had testified. The court held that the jury's view of the property alone could not support the award, stating: "The true rule appears to be that a jury cannot disregard the evidence as to value and render a verdict in excess of that shown by the testimony of the witnesses. The view of the premises cannot be the sole basis for an award. Value must be arrived at from the opinion of well-informed persons based upon the purposes for which the property is suitable. While the view of the premises is evidence in a condemnation proceeding, it is merely corroborative of the quantitative oral testimony." (*Id.* at p. 105.)

The limitations of the foregoing rule are "intended 'to prevent evidence, otherwise admissible, from being used to support a verdict outside the range of opinion testimony.' (*State ex rel. Public Works Bd. v. Wherity* (1969) 275 [Cal.App.2d] 241, 249 (dictum). But see *Los Angeles City High Sch. Dist. v. Swensen* (1964) 226 [Cal.App.2d] 574 (jury relied on comparable sales data to fix valuation lower than any testimony suggested).)" (1 *Matteoni & Veit, supra*, § 9:102, p. 598.)

The rule has not been immutably applied however. The general principle is that “the jury may not *arbitrarily* determine an amount outside the range of the valuation testimony.” (1 *Matteoni & Veit, supra*, § 9:102, p. 598, italics added.) In *People ex rel. Dept. of Pub. Wks. v. Jarvis* (1969) 274 Cal.App.2d 217 (*Jarvis*), the court held that the jury does not act arbitrarily in making an award of severance damages that is higher than the total severance damage estimate of any single witness where the award does not exceed “the highest valid arithmetical combination of factors selected from the testimony of all the witnesses.” (*Id.* at p. 227.) “Similarly, the severance damage award may be lower than the range of testimony if the jury has based its verdict on factors presented by the witnesses. [Citations.]” (1 *Matteoni & Veit, supra*, § 9.102, p. 598, citing *McNulty, supra*, 59 Cal.2d 333 and *City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 409.)

In *McNulty, supra*, 59 Cal.2d 333, the California Supreme Court held an award of severance damages that was \$650 less than the lowest estimate given by the district’s evaluation witness was not unsupported by the evidence where the witness included the entire increased cost to build a railroad bridge in his severance damages evaluation. There was no testimony that the bridge was essential to the economic necessity of developing the owners’ remaining land and the expert recognized the need to meet this increased cost would depend upon whether the owner wanted a spur track. (*Id.* at p. 338.) The Supreme Court held that the “jury was not required to conclude that the diminution in market value of the remaining land would necessarily be equal to the increased costs testified to by the witness, and in these circumstances the fact that the award of severance damages was \$650 lower than the lowest expert estimate does not mean the award was without support in the record.” (*Ibid.*) The court distinguished *Modell, supra*, 177 Cal.App.2d 321 and *D.P.W. v. McCullough, supra*, 100 Cal.App.2d 101, on the grounds that they “did not involve the weight to be given to increased costs of development in determining the diminution of market value of the owner’s remaining land, and *they stand merely for the proposition that the trier of fact may not disregard*

expert evaluations where there is no reasonable basis in the record for doing so.”
(*McNulty*, at p. 338, italics added.)

In denying SamTrans’s motion for a new trial, the trial court here cited to *McNulty*, *supra*, 59 Cal.2d 333 and *Jarvis*, *supra*, 274 Cal.App.2d 217, apparently concluding that there was a “reasonable basis in the record” (*McNulty*, at p. 338) for the jury’s award of severance damages to Sears in a sum greater than Betts had allotted. The record supports that decision. First, unlike any of the cases cited, in this case the total severance damages award to Owners for loss of parking was well within the range of expert testimony and was significantly less than that sought by Owners. Betts explained that to arrive at his valuation of Sears severance damages, he had simply allocated total parking severance damages in proportion to his calculation of how many spaces were lost by each Owner. However, there was also evidence in the record that because of the take, Sears lost highly desirable “open field” parking east of the store. Ray Velkers, Sears District Manager, testified that the Sears at Tanforan was a “flagship store” and that it had “carried that mall” for years, as a destination retailer, bringing people to the mall. He further testified that the open-field parking that Sears had near its store and that it would lose, was by far the preferred type of customer parking. He understood that the lost parking would be replaced in a garage. The jury could have reasonably determined that Sears was more affected by the project than other Owners and that the open-field parking lost by Sears was more valuable than that lost by other Owners. In these circumstances, the jury could reasonably have allocated damages differently than Betts advocated. Alternatively, the jury could have allocated to Sears all 288 spaces Betts testified would be lost to the footprint of the new garage instead of the proportionate 25 percent that Betts had allocated. The replacement garage was being built adjacent to the Sears store, on Sears property, and such allocation would have been reasonable, based on the record.

SamTrans counters that it had exercised its right under section 1260.220, subdivision (a), to have the jury determine the amount of severance damages suffered by each individual owner and that the award to *each Owner* must come within the range of expert testimony allocating damages to that Owner. We disagree.

The damage suffered by each Owner was separately assessed as required by the statute. There was no error in Betts's first determining total severance damages suffered by the entire property and then allocating those damages among the various Owners. SamTrans received the separate valuations to which it was entitled. Its attempts to reduce the total award of severance damages suffered by the center by "picking off" the Owners one-by-one are unavailing.

Substantial evidence supported the jury's award to Sears of severance damages for parking loss.

IX. Refusal to Require Owners to Post a Bond Before Withdrawing Money From the State Condemnation Deposits Fund After Judgment

SamTrans contends that the court erred in refusing to require that Owners put up a bond before withdrawing funds from the State Condemnation Deposit Fund.

On April 16, 2003, following entry of judgment below, Owners filed a joint application for withdrawal of \$23,045,811 on deposit with the State Condemnation Deposits Fund.⁴⁸ Over SamTrans's objections, the trial court permitted Owners to withdraw these sums without filing an undertaking, stating it was exercising "the Court's discretion" pursuant to section 1268.140, subdivision (c). SamTrans argued in the trial court that a bond was required under section 1255.250 and, alternatively, that the court had abused its discretion under section 1268.140, subdivision (c), in refusing to order an undertaking. SamTrans sought an immediate stay and issuance of a writ in this court, which we denied on May 13, 2003.

In its opening brief, SamTrans argues that an undertaking was mandatory under section 1255.250, subdivision (a). Owners counter that the withdrawal provisions of section 1255.250 apply to withdrawals before entry of judgment and that postjudgment withdrawals, such as those at issue here, are governed by Chapter 11, Article 2, and

⁴⁸ With the exception of \$85,400 deposited for the benefit of J.C. Penney, Owners withdrew all prejudgment deposits made by SamTrans.

specifically by section 1268.140.⁴⁹ In its reply brief, SamTrans argues not only that section 1255.250 applies, but *alternatively*, that the court abused its discretion under section 1268.140 in refusing to require an undertaking on these facts. We conclude that the court properly determined that section 1268.140 applied here to the postjudgment withdrawal of funds by Owners. We further conclude that SamTrans has waived any claim that the court abused its discretion under section 1268.140 and, in any event, that there was no showing that the court abused its discretion in refusing to require an undertaking.

Section 1255.250, subdivision (a), provides in relevant part:

“If the amount originally deposited is increased pursuant to Section 1255.030 and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicant, or each applicant if there are two or more, *shall file an undertaking*. The undertaking shall be in favor of the plaintiff and shall secure repayment of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with interest as provided in Section 1255.280. If the undertaking is executed by an admitted surety insurer, the undertaking shall be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. . . .” (Italics added.)

Section 1255.250 appears in the Eminent Domain Law, Chapter 6 “Deposit and Withdrawal of Probable Compensation; Possession Prior to Judgment,” Article 2 “Withdrawal of Deposit.” Article 2 begins with section 1255.210, which provides in relevant part: “*Prior to entry of judgment*, any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited. . . .” (§ 1255.210, italics added.) The Law Revision Commission comment to section 1255.210 states: “Section 1255.210 is derived from subdivisions (a) and (c) of former Section 1243.7. *After entry*

⁴⁹ Presumably because SamTrans did not raise any claim that the court abused its discretion under section 1268.140 in its opening brief, Owners limit their discussion of the court’s exercise of discretion under section 1268.140 to a footnote.

of judgment, deposits made under this chapter may be withdrawn pursuant to section 1268.140. See Section 1268.010 (upon entry of judgment deposit made pursuant to this chapter deemed to be deposit made pursuant to section 1268.110.)” (Cal. Law Rev. Com. com., 19 West’s Ann. Code Civ. Proc., *supra*, foll. § 1255.210, p. 696, italics added.) Section 1255.250 is derived from former section 1243.7, subdivision (b). (Cal. Law Rev. Com. com., *supra*, foll. § 1255.250, p. 701.) The location of section 1255.250 indicates the Legislature’s intent that its provisions apply *before* entry of judgment. The Law Revision Commission comment to section 1255.210 supports the contention that after judgment, withdrawals are governed by section 1268.140.

SamTrans argues that *Whittier Redevelopment Agency v. Oceanic Arts* (1995) 33 Cal.App.4th 1052 (*Oceanic Arts*) supports its claim that section 1255.250 applies postjudgment as well. That case does not involve a request to withdraw funds after judgment, or any issue of withdrawal of deposited funds at all. Rather, in *Oceanic Arts*, the appellate court affirmed the trial court’s granting of the defendant owners’ motion to require the plaintiff agency to *increase its deposit* following an order awarding the agency prejudgment possession and a judgment awarding defendants more than the amount deposited by the plaintiff as probable compensation. (*Id.* at p. 1054.) The court held that “when a plaintiff in an eminent domain action has acquired prejudgment possession of the property, the amount of the judgment exceeds the amount plaintiff has deposited as probable compensation and an appeal of the judgment is pending, the trial court has authority under section 1255.030 to order plaintiff to increase its deposit to an amount equal to the amount of the judgment.” (*Id.* at p. 1060.)

The *Oceanic Arts* court recognized that *People ex rel. Dept. of Transportation v. Zivelonghi* (1986) 181 Cal.App.3d 1035 (*Zivelonghi*) had concluded, based upon the legislative history of section 1255.030 and related sections, that the eminent domain law had failed to provide a procedure for redetermining the amount of a deposit made to obtain prejudgment possession after a judgment had been entered and an appeal taken. (*Oceanic Arts*, *supra*, 33 Cal.App.4th at p. 1057, citing *Zivelonghi*, at p. 1045.) Other sections dealt with redetermining the adequacy of the deposit after judgment had been

entered. (*Oceanic Arts*, at pp. 1057-1058.) However, *Zivelonghi* held nevertheless that “ ‘the trial court under its inherent power’ could devise ‘a procedure for determination and redetermination of probable compensation where prejudgment possession continued postjudgment.’ ” (*Oceanic Arts*, at p. 1058, quoting *Zivelonghi*, at pp. 1045-1046.)

Oceanic Arts, *supra*, 33 Cal.App.4th 1052 agreed with the conclusion, but not the reasoning, of *Zivelonghi*, *supra*, 181 Cal.App.3d 1035. *Oceanic Arts* concluded that “it was unnecessary to resort to the ‘inherent powers’ of the court to provide a remedy for defendant because section 1255.030 provides the necessary authority to order a plaintiff which has obtained prejudgment possession to increase its deposit of probable compensation when a judgment exceeding the amount on deposit has been entered and the plaintiff seeks to retain possession pending appeal.” (*Oceanic Arts*, at p. 1058.) The court relied upon the express language of section 1255.030, subdivision (a), which states: “ ‘At any time after a deposit has been made pursuant to this article, the court shall, upon the motion of [any interested party], determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding.’ (Italics added.) Subdivision (c) of that section states: ‘If the plaintiff has taken possession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court shall order the amount deposited to be increased to the amount determined to be the probable amount of compensation.’ ” (*Oceanic Arts*, at p. 1058.) The *Oceanic Arts* court interpreted the phrase “at any time” literally and concluded that subdivisions (a) and (c) of section 1255.030, “require [the court] to order a plaintiff who has obtained prejudgment possession to increase the amount of its deposit of probable compensation following a judgment in excess of the amount deposited.” (*Oceanic Arts*, at p. 1058.) The *Oceanic Arts* court rejected the plaintiff’s claim that the phrase “at any time” meant “at any time prior to judgment.” (*Id.* at pp. 1058-1059.) Also, the court found “no basis for concluding the Legislature intended to provide defendants whose property is taken *after* judgment greater protection than defendants whose property was taken *prior* to judgment.” (*Id.* at p. 1059.) The court recognized that plaintiffs who gained possession after judgment “are required to

post security in the full amount of the judgment in order to obtain possession while an appeal is pending. (§ 1268.210, subd. (a).)” (*Oceanic Arts*, at p. 1059.) The court also observed that increasing the amount of the deposit would not impact upon the “effectiveness of the appeal should plaintiff prevail. Plaintiff has statutory protections should defendants seek to withdraw any of the additional deposit. (See §§ 1268.140, subds. (c), (d), 1268.160, 1255.210-1255.280.)” (*Oceanic Arts*, at p. 1060.)

Oceanic Arts, *supra*, 33 Cal.App.4th 1052 does not support SamTrans’s claim. As we have observed, that court dealt wholly with the deposit of additional compensation, not with issues relating to the withdrawal of compensation. Importantly, the court there relied heavily upon the critical phrase “[a]t any time” appearing in section 1255.030 as authority for the trial court to determine or redetermine the amount of probable compensation after judgment. (*Oceanic Arts*, at p. 1058.) Section 1255.250 contains no similar language supporting its importation into a postjudgment context. Nor is there any legislative gap or inequity operating here comparable to that concerning the courts in *Zivlonghi*, *supra*, 181 Cal.App.3d 1035 and *Oceanic Arts*, at page 1059. More importantly, as recognized by the trial court here, there is a specific statute that governs withdrawal of deposits after entry of judgment—section 1268.140.

That statute provides: “(a) After entry of judgment, any defendant who has an interest in the property for which a deposit has been made may apply for and obtain a court order that he be paid from the deposit the amount to which he is entitled upon his filing either of the following: [¶] (1) A satisfaction of the judgment. [¶] (2) A receipt for the money which shall constitute a waiver by operation of law of all claims and defenses except a claim for greater compensation. [¶] . . . [¶] (c) Upon objection to the withdrawal made by any party to the proceeding, the court, *in its discretion, may require the applicant to file an undertaking* in the same manner and upon the conditions prescribed in Section 1255.240 for withdrawal of a deposit prior to entry of judgment. [¶] (d) If the judgment is reversed, vacated, or set aside, a defendant may withdraw a deposit only pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6.” (§ 1268.140, *italics added*.)

Section 1255.240, referenced in subdivision (c) of section 1268.140, provides that the court “*may require*” an applicant “entitled to withdraw any portion of a deposit that another party claims or to which another party may be entitled” to file an undertaking. (§ 1255.240, subd. (a), italics added.)⁵⁰

Section 1268.140 addresses the issue here directly and allows the court discretion to require an undertaking. The statute would be rendered meaningless were we to determine that section 1255.250 applies after judgment to mandate an undertaking.

We reject SamTrans’s claim that section 1255.250 *requires* the court to impose an undertaking before allowing the Owners, after judgment, to withdraw money to which they are entitled from the deposit.

In its reply brief, SamTrans for the first time argues that the trial court abused its discretion under section 1268.140 in refusing to require an undertaking. SamTrans argues that Owners raised the issue in their respondents’ brief and that the issue is therefore properly before this court. We disagree. The issue of the applicability of section 1268.140 was raised and argued in the trial court. SamTrans argued below that the court would abuse its discretion under that statute if it did not require an undertaking. It argued there, as it does in its reply brief, that despite having billions of dollars in assets, Target and Sears could become bankrupt and that the only property known to be held by the other Owners was Tanforan itself. The trial court specifically relied upon section 1268.140 and the discretion afforded it thereunder to reject SamTrans’s request for a bond. Owners’ respondents’ brief focuses upon the inapplicability of section 1255.250 and the applicability of section 1268.140. Other than a conclusionary statement in a

⁵⁰ Owners contend that under section 1268.140, subdivision (c), and in the whole context of Article 2, the court may require an undertaking *only* when competing claimants are seeking to withdraw funds after judgment. They argue that as the Owners here are not competing, the court has no discretion to require an undertaking in order to allow Owners to withdraw funds to which they are entitled by the judgment. Although the phrase “any party” in subdivision (c) renders Owners’ argument somewhat doubtful in this regard, we need not resolve it as we have determined that the trial court did not abuse its discretion in refusing to require the undertaking.

footnote that the court did not abuse its discretion, Owners do not address the factors they contend demonstrate that the court acted within its discretion. We may reasonably infer that Owners did not do so because SamTrans limited its attack in its opening brief to the assertion that section 1255.250 governed.

In these circumstances, where the exercise of the court's discretion under section 1268.140 was clearly central to the court's ruling below, where SamTrans did not address the question in its opening brief, but reserved the issue to its reply brief (and refers us to its request for an immediate stay and writ petition for its response), we properly may consider the claim waived.

In the alternative, on the record before us, we conclude that SamTrans has failed to demonstrate that the trial court abused its discretion in refusing to order an undertaking in the circumstances presented. Any excess withdrawal by Owners must be repaid. (§ 1268.160; 2 Matteoni & Veit, *supra*, § 10.34, p. 663.) In the event of a reversal on appeal, Owners must reimburse the amount withdrawn in excess of the final award on retrial whether the appeal was taken by the defendant or by the plaintiff. (2 Matteoni & Veit, *supra*, at § 10.34, p. 663; see *City of Downey v. Johnson* (1978) 79 Cal.App.3d 970.) It is not disputed that Sears and Target have assets worth more than a billion dollars each and that the other Owners at a minimum own a considerable stake in Tanforan, a property valued at more than \$100 million. SamTrans's concerns that these defendants might prove unable to repay any excess withdrawal in the event of reversal were mere speculation. SamTrans has failed to demonstrate that the trial court abused its discretion in refusing to require an undertaking before allowing Owners to withdraw the compensation awarded by the jury.

Conclusion on SamTrans's Appeal

In sum, we have concluded upon consideration of SamTrans's appeal that we must partially reverse the judgment in two respects: The trial court erred in permitting TPSC LP to recover severance damages where the only property owned by that entity was the "toothpick," which was taken in its entirety. It also erred, in the circumstances presented here, in allowing Owners to recover damages for both the loss of surface

parking and for loss of development rights in violation of the “consistent use” principle. Neither error infected the balance of the jury verdict. Consequently, we shall reverse the award of severance damages to TPSC LP in the sum of \$710,390.60 and shall modify the judgment to reallocate that severance damages award among the other Owners as set forth herein. We shall also reverse the award of severance damages for development rights (in other words for severance damages *not* attributable to parking loss) in the total sum of \$2 million to Owners awarded by the jury as: \$1.5 million to TPSC LLC; \$200,000 to Sears; \$300,000 to Target/Sneath.⁵¹

OWNERS’ CROSS-APPEAL

Owners have filed what they describe to be a “protective cross-appeal” from the judgment. As we have reversed a portion of the judgment, we proceed to address the issues raised by Owners in their cross-appeal. Owners contend that the trial court erred (1) in excluding the “bone” from the larger parcel; (2) in refusing to allow Owners to present evidence concerning the value of Huntington Avenue; (3) in excluding evidence of the cost to construct BART’s parking garage; and (4) in excluding evidence of BART’s commitment to replace lost parking as memorialized in the Final Environmental Impact Report prepared for the project (Final EIR). We shall conclude these claims are without merit.

As a threshold matter, SamTrans argues we should deny the cross-appeal on grounds that it fails to comply with format requirements set forth in California Rules of Court, rule 14. Owners counter that the information SamTrans contends is missing may be found in the appeal and Owners’ responsive briefing. The Owners’ briefing of the issues they raise in the cross-appeal is adequate to allow review. In the circumstances of

⁵¹ SamTrans has filed a detailed motion for sanctions in connection with this appeal, arguing that Owners’ briefing and argument do not comport with the California Rules of Court. Our review of this record and the briefing persuades us that sanctions are not warranted. We therefore deny SamTrans’s motion.

this appeal and in light of the extensive briefing, we choose to disregard any noncompliance by Owners' with rule 14, except as specifically set forth hereafter.

X. Trial Court Exclusion of the "Bone" from Larger Parcel

Owners contend that the trial court erred in ruling that the "bone" was not a part of the larger parcel. The "bone" was owned in fee by the City and County of San Francisco Water Department (CCSF). Part of the parcel was leased to TPSC LP, the owner of the "toothpick," under a lease which was to expire on May 31, 2005. Because of the BART condemnation of the "bone," the lease expired, by its own terms, on March 6, 1999, 30 days after written notice of termination by CCSF following the condemnation by BART.

We have previously discussed the standard of review we apply to the trial court's determination of the larger parcel in connection with SamTrans's claim that the court erred in including the "toothpick" as part of the larger parcel. (See pt. II, *ante*, at pp. 11-29.) Although the parties here both agree that the question is subject to our de novo review, we have recognized that the determination in a particular case whether the property taken is part of a larger parcel "is entrusted to the trial court. [Citations.] Although the question has often been described as one of 'law' [citations], it is decided by the court even if it involves issues of fact [citations]." (*Harcros Pigments, supra*, 101 Cal.App.4th 1083, 1117.) "Insofar as the evidence is subject to opposing inferences, it must upon a review thereof, be regarded in the light most favorable to the ruling of the trial court." (*Nyrin, supra*, 256 Cal.App.2d 288, 292; accord, *Harcros Pigments*, at p. 1117.)

We are persuaded that the evidence presented here raises opposing inferences that were appropriately resolved by the trial court. The key distinction between the "toothpick" and the "bone" insofar as the larger-parcel determination is concerned, is that the "toothpick" was owned by TPSC LP, one of the center Owners, whereas the "bone" was owned entirely by CCSF and was leased to TPSC LP. The trial court could determine that this distinction and the expiration of the lease by its own terms following the condemnation by BART evidenced an absence of the required unity of title.

Owners argue that the unity of title was achieved through the REA, which constituted a recorded easement against title to the “bone” and gave an easement interest in the “bone” to each Owner-participant in the REA. That the “bone” was used as part of the integrated operation of Tanforan was a factor to be considered by the trial court, but the unity of use is not the equivalent of the unity of title and the trial court was not required to find a unity of title on these facts. Nor was CCSF bound by the REA in the same way that Owners were bound. A declaration filed by SFPUC Director Dowd on the larger-parcel determination declared that “use of the [b]one under the Master Lease was encumbered by the REA.” However, the Master Lease referred to was the lease of the “bone” from CCSF to TPSC LP, and the use referred to was the use by TPSC LP. CCSF was not a member of the REA and had no obligation to provide parking at the center. Although the “bone” was used as part of the integrated operation of Tanforan (at least until expiration of the lease), and the REA bound TPSC LP, CCSF did not participate in the reciprocal use of the property and had no reciprocal rights or obligations in the use of the Tanforan property by virtue of the REA. Its rights and obligations were determined by the Master Lease agreement with TPSC LP.

We conclude that the trial court did not err in determining that the “bone” was not part of the larger parcel.

XI. Exclusion of Valuation Evidence for Huntington Avenue

Owners contend that the court erred in granting SamTrans’s motion in limine to exclude the testimony of valuation expert Carneghi as to the value of the fee interest underlying Huntington Avenue, adjacent to Owners’ parcels. They argue that there was no dispute that Owners (or some of them) owned the fee underlying Huntington Avenue to the centerline of the street, approximately 2.6 acres. Carneghi testified at deposition that the value of this interest was \$35 per square foot. Consequently, Owners contend they were denied the opportunity to seek more than \$5 million for the taking of this property. The claim is meritless.

Huntington Avenue is and has been a dedicated public street since January 5, 1967. (The San Bruno City Clerk certified a subdivision map, showing dedication of

streets contained therein, including Huntington Avenue.) It is established that “when the condemned property is already impressed with an easement for a public road, the underlying fee has only nominal value to the condemnee; in the absence of a special value attaching to it, the subsurface of the road is not considered in valuing the property. [Citations.]” (1 Matteoni & Veit, *supra*, § 4.79, pp. 202-204.)

Owners’ argument below was two-fold. First that BART, as an agency separate from the City of San Bruno, had no interest in Huntington Avenue, that interest being held by the City; and second, that the public right of way or easement for roadway purposes had been abandoned when BART had entered pursuant to the early access agreement and the roadway had been closed and a new roadway opened in late January 1999. On appeal, Owners also contend that BART’s take for use in constructing a BART station was not within the original easement for highway purposes. Owners contended that these issues require factual determinations to be decided by the jury.

A. Public Utilities Code section 29033 allows BART to stand in the shoes of the City of San Bruno with respect to the public right of way or easement over Huntington Avenue. Section 29033 provides: “The district [BART] may construct and operate or acquire and operate works and facilities in, under, upon, over, across, or along any street or public highway or any stream, bay or watercourse, or over any of the lands which are the property of the State, to the same extent that such rights and privileges appertaining thereto are granted to municipalities within the State.” This statute fully answers Owners’ claim that BART had no “interest” in Huntington Avenue. A similar statute applies to SamTrans. (Pub. Util. Code, § 103244.) Consequently, we reject the claim that BART, as a different agency than the City of San Bruno, had no interest similar to the City in condemning the property.

B. Owners contend that there existed a factual issue for the jury as to whether Huntington Avenue was still in use as of the valuation date. They rely on *Romero v. Department of Public Works* (1941) 17 Cal.2d 189, 196 (*Romero*), wherein part of a strip of land formerly used for railroad purposes had reverted to heirs of the original grantor. In *Romero*, the state, after condemning a part of the strip for highway purposes in a

proceeding against the railroad company, later took an additional part for such purposes without paying compensation. *Romero* acknowledged the general rule “that the owner of the possibility of a reverter prior to a breach of the condition is not entitled to compensation when the property is taken under the law of eminent domain. Such cases hold that the possibility of voluntary abandonment by non-user is so remote and improbable that it has no substantial value to be estimated in a condemnation proceeding. They recognize, however, that the owner of the fee or the reversionary interest should have a separate valuation of his interest where the land taken has some special value to him, as where the underlying lands are shown to be mineral bearing or otherwise of value separately from the use of the surface of the land; but that otherwise the law will not take notice of the separate value of the fee and of the user where there is no substantial difference in their values, and if, in such case, at the time fixed for the valuation the reversion has not occurred, the reversionary interest is said not to have any compensable value in a condemnation proceeding. [Citations.]” (*Id.* at pp. 194-195.)

The *Romero* court concluded that the language in the original grant deed provided for a reversion in the event of a cessation of the use of the strip for railroad purposes and that *the reversion had occurred* after the abandonment by the railroad. (*Romero, supra*, 17 Cal.2d at pp. 194-196.) *Romero* then held that whether the heirs could show they were entitled to some compensation could not be determined on demurrer *where the question depended on whether the reversionary right had a separate value from the easement condemned*. Such determination presented a question of fact. (*Id.* at p. 196.) Owners seize upon this part of *Romero* to argue that issues of fact are present with respect to the status of Huntington Avenue. We disagree.

Despite Owners’ suggestion to the contrary, unlike *Romero*, the instant case presents no question of abandonment or “reverter” of any interest in Huntington Avenue. On appeal, Owners fail to point to language in any agreement or statute entitling them to a “reverter” upon abandonment or nonuse of Huntington Avenue for a street. Rather, they argue that “the easement interest that existed for the public’s use of Huntington Avenue as a street terminated prior to the valuation date,” and that “once BART

condemned the portion of Huntington Avenue owned in fee by the Owners, the City's easement terminated." In short, they appear to argue that BART's condemnation or precondemnation activities effected an abandonment by the City. There is no support for this suggestion and it is meritless. As BART stands in the shoes of the City with respect to its right to condemn the street, there is no question of abandonment of the easement.

Furthermore, Owners do not claim on appeal that they have any special interest (such as valuable mineral rights) separate and apart from a reversionary interest in the land—the only issue that the Supreme Court in *Romero* determined presented a factual question.

Consequently, the general rule pertains. Because Huntington Avenue was a dedicated public street, the underlying fee "has only a nominal value." (*City of Los Angeles v. Fiske* (1953) 117 Cal.App.2d 167, 173; accord, *Romero, supra*, 17 Cal.2d at pp. 194-195.)

C. We also reject Owners argument that they are entitled to more than "nominal" compensation because BART's take of Huntington Avenue for construction of a BART station was not within the original easement for highway purposes. Numerous cases have concluded that the courts take an expansive view of public rights-of-way. (See, e.g., *Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 355; *Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 416-418; *Bello v. ABA Energy Corp.* (2004) 121 Cal.App.4th 301, 311-312.) " 'When land is taken or dedicated for use as a highway, the taking or dedication should be presumed to be not merely for such purposes and uses as were known and customary, at that time, but also for all public purposes, present or prospective, whether then known or not, consistent with the character of such highways' " (*Norris v. State of California ex rel. Dept. Pub. Wks.* (1968) 261 Cal.App.2d 41, 47; see *Anderson v. Time Warner Telecom of California*, at pp. 415-416 [fiber optic cables within scope of telephone company's statutory easement to use highway to install telephone and telegraph lines]; *Collopy v. United Railroads* (1924) 67 Cal.App. 716, 723 [highway right-of-way includes "new and improved methods" of transportation, such as rail].)

Mancino v. Santa Clara County Flood etc. Dist. (1969) 272 Cal.App.2d 678, addressed the issue in the context of an inverse condemnation action seeking damages for construction of a storm drainage system, including a control box in the street in front of the plaintiff's home. The court ruled that the issue was properly withheld from the jury where it was conceded that the street was a public street and where the structure did not interfere with plaintiff's access to her home or the use of her sidewalk. (*Id.* at p. 682.) In so concluding, the court cited with approval a Michigan case that appears directly on point here: "In *Cleveland v. City of Detroit* [(1949)] 324 Mich. 527 [37 N.W.2d 625 . . .], the Supreme Court of Michigan considered a case where the City of Detroit, finding it to be in the public interest, authorized the construction, under a public street, of a garage 156 feet wide, 1,000 feet long and 2 stories deep. Owners of the underlying fee sought to enjoin the project, claiming among other things 'an unconstitutional invasion of plaintiff's rights in that such rights have not been acquired by condemnation or otherwise; . . . ' (*Id.* at pp.] 530-531.) The court rejected the claim, stating ([at] pp. 535-536): [¶] ' . . . It may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it. . . . [¶] So far, then, as these defendants are concerned, it is immaterial whether they or the city own the fee in the street. Their rights are the same in either case. So long as they are unobstructed in the use and enjoyment of their property, having convenient ingress and egress, and the use of the street is an authorized and proper public use, they have no legal cause for complaint.' " (*Mancino v. Santa Clara County Flood etc. Dist.*, at pp. 682-683.)

D. Were we to conclude that some factual issue (such as question of reverter) remained for resolution, we may infer from the court's grant of the motion in limine that it found in favor of SamTrans and against Owners. The resolution of this type of factual issue was entrusted to the discretion of the trial court as part of its role in determining the admissibility of evidence.

The jury's role in an eminent domain action is to determine the amount of just compensation. (See Cal. Const., art. I., § 19; *Coachella Valley Water Dist. v. Western Allied Properties, Inc.* (1987) 190 Cal.App.3d 969, 976.) All other issues of fact and law must be decided by the court. (*Coachella Valley Water Dist.*, at p. 974; *People v. Ricciardi*, *supra*, 23 Cal.2d at pp. 402-403.) As in any other judicial proceeding, the court determines the admissibility of evidence and the scope of admissible evidence. (See *City of Ripon v. Sweetin*, *supra*, 100 Cal.App.4th at pp. 900-901; *Tobriner II*, *supra*, 215 Cal.App.3d at p. 1097, fn. 5.) The court may exclude evidence not relevant to the valuation questions presented to the jury (*Tobriner II*, *supra*, at p. 1097, fn. 5) and may exclude speculative evidence as unduly prejudicial (*People ex. rel. Dept. of Water Resources v. Andresen* (1987) 193 Cal.App.3d 1144, 1162-1163).

The trial court in an eminent domain proceeding determines the admissibility of valuation evidence and is vested with “ ‘ ‘ ‘ ‘considerable judicial discretion in admitting or rejecting evidence of value.” ’ ’ ’ ’ (*City of San Diego v. Barratt American, Inc.*, *supra*, 128 Cal.App.4th at pp. 936-937, quoting *City of San Diego v. Sobke*, *supra*, 65 Cal.App.4th at p. 396, in turn quoting *County Sanitation Dist. v. Watson Land Co.*, *supra*, 17 Cal.App.4th 1268, 1282.) The trial court determines whether the evidence supporting a particular compensation claim is sufficient to be presented to the jury, as “the court, rather than the jury, typically decides questions concerning the preconditions to recovery of a particular type of compensation, even if the determination turns on contested issues of fact.” (*Harcros Pigments*, *supra*, 101 Cal.App. 4th at p. 1116.)

Clearly here there was no abuse of discretion in excluding Owners' evidence as to the value of their fee interest in Huntington Avenue. As Owners were at most entitled to “nominal value,” the trial court could conclude under Evidence Code section 350 that the valuation testimony was irrelevant, and under Evidence Code section 352 that it would prove unduly prejudicial, time consuming, and likely to confuse the jury.

XII. Exclusion of Final EIR re: Parking Replacement as a Mitigation Measure

Owners argue that the court erred in excluding evidence of the Final EIR, containing a commitment by BART to replace parking at Tanforan on a one-for-one basis, as a mitigation measure to ameliorate parking-related impacts caused by the project. Owners have failed to demonstrate that the court abused its discretion in excluding this evidence. Nor have Owners demonstrated they were prejudiced by this ruling.

Owners argue that the trial court based its exclusion of evidence of the Final EIR and the parking commitment made therein on the “technicality” that the parking replacement mitigation measure concerned a design alternative other than the one ultimately built and was thus not “the project as proposed.” As argued by SamTrans and found by the court, the mitigation measures that Owners sought to introduce were recommended in conjunction with various design alternatives that BART never adopted and that differ significantly from the alternative that was ultimately approved. Owners contended that the same mitigation measures applied to each of the design alternatives, so that the one-for-one replacement parking provided in the Final EIR necessarily applied to the design alternative ultimately selected and constructed by BART. Section 1263.450 requires that severance damages “shall be based on the project as proposed” (accord, *Rudvalis, supra*, 109 Cal.App.4th at pp. 678-679). We believe that the trial court acted within its discretion in determining that these mitigation measures contained in the Final EIR were not part of the “project as proposed” and hence, could not provide a basis for a severance damages claim.

In any event, Owners have failed to demonstrate they were prejudiced by the exclusion of this evidence. Owners do not even argue in their opening brief on cross-appeal that the exclusion of the evidence was prejudicial. Although arguing in their reply brief that this evidence was *relevant* to the critical issue of the need for replacement parking, Owners do not attempt to demonstrate that they were prejudiced by its exclusion. Nor could they succeed in doing so in light of the court’s admission of

evidence of promises made by BART's representative that any parking loss would be replaced on a one-for-one basis and of Owners' understanding that lost parking would be replaced by BART. (See pt. VI, *ante*, at pp. 102-106.) The evidence of the Final EIR was cumulative to this. It is not reasonably probable that Owners would have received a more favorable verdict, but for exclusion of evidence of the Final EIR replacement parking mitigation measure.

XIII. Exclusion of Evidence of the Costs of BART's Garage

Owners contend the court erred in refusing to admit evidence of the actual construction costs for BART's own garage. Owners sought to show that BART's own garage costs were \$20,000 per stall. Owners argue that such evidence was relevant to impeach BART's appraisal expert Talmage who had testified that constructing Tanforan's replacement garage would cost only \$13,200 per stall, rather than the \$20,830 per stall sought by Owners. We conclude that the trial court did not abuse its discretion in excluding evidence of the construction costs for the BART garage.

SamTrans moved in limine to exclude evidence of the construction costs for the BART garage. SamTrans pointed out that none of the parties' experts relied upon the bids, estimated costs or actual costs of constructing the BART garage when valuing their severance damages or in estimating the cost of the Owners' replacement garage. SamTrans also argued that the BART garage and the Owners' replacement garage were not sufficiently similar structures. Consequently, the construction cost evidence was irrelevant under Evidence Code section 350 and/or more prejudicial than probative under Evidence Code section 352. At trial, SamTrans produced evidence that the cost of the BART garage had little or no relevance to the cost of the proposed replacement garage. The BART project engineer described the garage as part of the "project as proposed." Among the features distinguishing the BART garage from Owners' proposed replacement garage are: BART's garage was five floors, whereas Owners' proposed replacement garage was three floors. The ground floor of BART's garage contained no public parking, but was given over to accommodating public uses, including bus bays, drop off and pickup spots for passengers, and official parking for BART police and City

police. The BART garage contained unusual architectural features because the garage faced Huntington Avenue. Its corners were rounded to follow the profile of Huntington Avenue; it was set back to reduce the mass from street level, and it was built with a ground floor twice the height of a normal garage to accommodate an access road under the garage.

The trial court could properly determine in the exercise of its discretion that admission of evidence of the costs to construct the BART garage would run the risk of deflecting the jury from the task of determining the fair market value of the property being acquired and the diminution in market value to the remainder. The parties could easily become focused on the BART garage and the justifications for its projected costs. The BART garage was a public project and there was no evidence that market forces controlled either its design or cost. It was very likely that such evidence would have necessitated an undue consumption of time as SamTrans was likely to have been required to present further rebuttal and cross-examination to highlight the differences between the garages.

Although Owners argue that the cost of the BART garage was relevant to impeach Talmage's cost estimate and to counter SamTrans's claim that Owners' estimate of the costs of a replacement garage were unreasonable, the trial court acted within its discretion in determining that the marginal relevance, if any, of this evidence was outweighed by the undue prejudice its introduction would cause. Under the abuse of discretion standard that we apply, Owners have failed to show that in excluding the evidence of the BART garage the trial court exceeded the bounds of reason, all of the circumstances being considered. (See *City of San Diego v. Sobke*, *supra*, 65 Cal.App.4th 379, 396.)

APPEAL OF DENIAL OF OWNERS' LITIGATION EXPENSES

Owners separately appeal from the order denying them their litigation expenses. They contend that they were entitled to the award of such expenses pursuant to section 1250.410, which provides in relevant part:

“(a) At least 20 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final

offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. The offer and the demand shall include all compensation required pursuant to this title, including compensation for loss of goodwill, if any, and shall state whether interest and costs are included. These offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. . . .

“(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant’s litigation expenses. [¶] . . . [¶]

“(d) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.” (§ 1250.410.)

On February 20, 2001, Owners filed their final demand for compensation pursuant to section 1250.410, demanding compensation as follows:

Target—\$1,575,000 (loss of goodwill); Sears—\$876,000 (loss of goodwill); Sears—\$3,344,925 (fee take for land, improvements, easements and cost to cure); TPSC LLC—\$1,611,173 (fee take for land, improvements, easements and cost to cure); TPSC LP—\$5,082,066 (fee take for land and improvements); Sneath and Target collectively—\$5,387,795 (fee take for land, improvements, easements and cost to cure); all Owners jointly demanded severance damages of \$31,500,000. Collectively, Owners’ demand amounted to \$49,376,959.

On February 21, 2001, SamTrans filed its final offer as follows:

To Target Corporation—\$300,000 (for lost goodwill, together with costs and interest); to Sears—\$219,000 (for lost goodwill, together with costs and interest); to all Owners—\$13,200,000 (for all claims except for loss of goodwill, together with interest and costs according to law). Consequently, SamTrans’s total offer amounted to \$13,719,000 plus costs and interest.

After the jury awarded Owners approximately \$27.5 million, including \$8,194,123.20 for the property actually acquired and \$19,326,600 in severance damages (including \$17,326,600 identified as “attributable to parking loss”), Owners moved for an award of their litigation expenses under section 1250.410.

Following extensive briefing and argument, the court ruled that Owners were not entitled to their litigation expenses. The court found that both SamTrans’s offer and Owners’ demand were *unreasonable* under the statute. The court also stated that it could *not* find that either SamTrans or Owners acted without good faith, care or accuracy in fashioning their respective final offer and demand.⁵²

⁵² The court’s ruling stated: “Regarding the second motion for entitlement to litigation expenses, there is a disagreement between the parties as to the applicable law. Defendants argue that under [*Continental, supra*,] 16 Cal.4th 694, . . . the only test to be applied to defendants’ offer is the third prong of [section] 1250.410, i.e., whether they exercise[d] good faith, care and accuracy in making their demand. They contend that demands need not be measured by 1) the amount of the difference between the demand and the offer and 2) the percentage of the difference between the demand and the award. [¶] Plaintiff[], on the other hand, argue[s] that all three prongs of the statutory test apply to both sides per *County of Contra Costa v. Pinole Point Properties* (1994) 27 Cal.App.4th 1105 and *New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473. [¶] This court believes that the plaintiff’s argument is more persuasive.

“Here, the Court finds that both sides were unreasonable. [¶] Plaintiff[’]s offer was approximately 50% of the jury award and was 32 million less than the demand (+/- an additional 3 million in interest[]). Defendants’ demand was 74% higher than the award.

“Plaintiff[’s] declaration reveals that [its] offer was driven by budgetary concerns of federal financing. Plaintiff argues that it was bound not to make an offer that was unsupported by its interpretation of statutory and case law, or any settlement offer would not be funded. However, plaintiff’s opinion as to the law was not accepted by the trial court in all respects. As a result, testimony was admitted which formed the basis of a higher award than offer. [¶] In addition, plaintiff’s offer was based on the assumption that defendants would continue to enjoy a non-conforming use on their property in respect to required parking ratios, a theory that was specifically disapproved in *People ex [rel.] Department of Transportation v. Woodson* (2001) 93 Cal.App.4th 954 [(*Woodson*)].

“Defendant[s’] demand, on the other hand, was based on an adamant refusal to consider any plans for less than ‘gold-plated’ garage. In every respect, defendants sought damages based on a garage with design features far in excess of those currently enjoyed.

Owners' central contention is that the trial court misinterpreted and misapplied the test set forth in *Continental*, *supra*, 16 Cal.4th 694, for determining entitlement to litigation expenses under section 1250.410. They argue that under the guidelines articulated in *Continental*, reasonableness of SamTrans's *offer* is evaluated based upon "“(1) the amount of the difference between the offer and the compensation awarded, (2) the percentage of the difference between the offer and award . . . and (3) the good faith, care and accuracy in how the amount of offer and the amount of demand, respectively, were determined. [Citations.]” ’ ” (*Continental*, at p. 720.) They assert that the reasonableness of their *demand* is not evaluated based upon the first two monetary factors, but *only* based upon the good faith, care and accuracy in how the demand was determined. Owners contend that the defendant's demand is “deemed reasonable” if it is found to meet the good faith, care and accuracy prong of *Continental*. Consequently, they argue that the trial court erred as a matter of law in finding their demand unreasonable.

The proper interpretation of a statute is a question of law, subject to our independent review. (*Mart v. Severson* (2002) 95 Cal.App.4th 521, 530; *Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74; see also Eisenberg et al.,

Defendants also argue that they reduced their demand by 40% prior to trial (plaintiff[] state[s] that defendants are misleading and the actual reduction was 27% in terms of its total demand as opposed to their severance damage claim only.) In any event, a 40% reduction did not bring the demand into the realm of reasonableness based on the jury verdict.

“Plaintiff[] and defendants were both per se unreasonable in their offers and demands under the first two prongs of [section] 1250.410. The final question then is whether the offer and demand were made with good faith, care and accuracy. Both sides relied on qualified experts for their opinions. Both sides attacked the other's expert. Testimony from both experts was allowed. Fair to say, each side played hardball on a zero-sum playing field. This court, after having heard the evidence, cannot say with any conviction that either side acted *without good faith, care or accuracy*. Accordingly the third prong of the statutory test does nothing to rescue either side in this case from a finding of unreasonableness. Hence, the motion for entitlement to litigation costs is denied.”

Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:4, p. 8-2.) Therefore, we review de novo whether the court applied a proper test under the statute. However, if the trial court correctly interpreted the statute, the trial court’s ruling on Owners’ entitlement to litigation expenses is reviewed for abuse of discretion. (*Continental, supra*, 16 Cal.4th at p. 722; *Casa Suenos, supra*, 129 Cal.App.4th 944, 985-987; *Woodson, supra*, 93 Cal.App.4th at p. 961; *People ex rel. Dept. of Transportation v. Yuki* (1995) 31 Cal.App.4th 1754, 1765 (*Yuki*).) In reviewing for abuse of discretion, we recognize that “[t]he trial court’s determination of that issue is a resolution of a question of fact and will not be disturbed on appeal if supported by substantial evidence.” (*Redevelopment Agency v. Gilmore* (1985) 38 Cal.3d 790, 808 (*Gilmore*); accord, *Casa Suenos*, at p. 986; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1214, 1217; *Yuki*, at p. 1765.)

We reject Owners’ claim that the first two prongs of the test, which address the mathematical relationship between the offer and the award, apply *only* to the offer of the condemning agency and not to Owners’ final demand.

We start with the language of the statute. Section 1250.410 provides for the award of litigation expenses where the court “finds that the offer of the plaintiff was unreasonable *and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding.*” (Italics added.) The statute mandates that the court assess the reasonableness of the defendant owner’s demand “in light of the evidence admitted and the compensation awarded in the proceeding.” (*Ibid.*) Owners would read out of the statute this language, giving no weight to the amount of the compensation awarded or evidence other than that going to a landowner’s good faith, care and accuracy in assessing the reasonableness of the its demand. The statute employs the same standard—reasonableness—to assess the offer and the demand and it specifically requires the court to compare both the offer and the demand to the compensation awarded. There appears to be no room in the statutory language for an interpretation that applies different standards to the parties.

“[P]rior law (former section 1249.3) had required the trial court, in ruling on such a motion, to determine whether the condemner’s offer was unreasonable and the condemnee’s demand was reasonable ‘ “all viewed in the light of the determination as to the value of the subject property.” ’ (*Gilmore, supra*, 38 Cal.3d at p. 808, italics omitted.) In contrast, section 1250.410 . . . requires the trial court to make its determination ‘ “in the light of the evidence admitted and the compensation awarded in the proceeding.” ’ (38 Cal.3d at p. 808, italics omitted.)” (*Continental, supra*, 16 Cal.4th at pp. 719-720.) In *Continental*, the Supreme Court reaffirmed that the mathematical relationship was not the *only* factor in the assessment of reasonableness, but was still a factor to be considered under the statute. (*Continental*, at p. 720; see *Gilmore, supra*, 38 Cal.3d at p. 808.)

No case cited to us or found by independent research expressly adopts or acknowledges that different standards apply or might apply to the statutorily required determination of reasonableness of the condemner’s offer and the owner’s demand. Indeed, applying the same analysis to the demand as to the offer, in *County of Contra Costa v. Pinole Point Properties, Inc.* (1994) 27 Cal.App.4th 1105 (*Pinole Point*), Division Five of this district reversed the award of litigation expenses to a mineral rights owner. The court found that the county’s offer was reasonable. (*Id.* at pp. 1114-1115.) It then proceeded to decide the claim that the owner’s demand was not reasonable. In analyzing the reasonableness of the demand, the court reasoned: “The courts have developed guidelines to help determine whether a demand is reasonable. These are (1) the difference between the demand and the compensation awarded, (2) the percentage of difference between the demand and the award, and (3) the good faith, care, and accuracy with which the demand was calculated. [Citations.]” (*Id.* at p. 1115.) The appellate court looked at the first and second factors, reasoning that the owner’s \$1 million demand was \$800,000 more than the actual award. “This alone suggests the demand was unreasonable. Furthermore, the demand was five times greater than the actual award.” (*Ibid.*) The court also looked to the evidence in the case, observing that the mineral interests at issue “had no proven value. . . . Given this evidence, and the

interplay of the three factors above, only one conclusion was possible. [The owner's] \$1 million demand was unreasonable.” (*Ibid.*)

In addition to *Pinole Point*, *supra*, 27 Cal.App.4th 1105, several other cases discuss the purpose of section 1250.410 and the guidelines or factors applicable to evaluation of the owner's demand in a manner that indicates that all guidelines apply to both the offer and the demand.

In *Santa Clara Valley Water Dist. v. Gross* (1988) 200 Cal.App.3d 1363, the Sixth Appellate District affirmed the denial of litigation expenses on the ground that the landowner's noncompliance with section 1250.410 in failing to file a final demand for compensation deprived the court of any basis upon which to determine the reasonableness of the parties. In so ruling, the court stated: “[Section 1250.410] was intended to reward the property owner only where he has demonstrated his own reasonableness. The court must find both that the plaintiff was unyielding, and that the property owner tendered a reasonable demand. [Citation.]” (*Id.* at p. 1373.)

In *Yuki*, *supra*, 31 Cal.App.4th 1754, the Sixth Appellate District held that the state's final offer was unreasonable and that the property owner was entitled to recover litigation expenses. In so holding, the court recognized that “[t]he purpose of section 1250.410 is to encourage settlement of condemnation actions by providing incentives to a party who submits a reasonable settlement offer *or demand* before trial. [Citations.]” (*Id.* at p. 1763, italics added.) “One factor to be considered in determining the reasonableness of an offer *or demand is the proportion it bears to the subsequent award to defendant.* (§ 1250.410, subd. (b); [citations].) In addition, case law has developed several other factors bearing on the question of reasonableness: ‘ . . . the proportional difference between offer and demand, the absolute monetary amounts, and the good faith, care and accuracy in the method of determination of offer and demand.’ [Citations.]” (*Yuki*, at pp. 1763-1764, italics added.) Apparently applying the factors to both parties in an evenhanded manner, the *Yuki* court observed that the owners' final demand in that case “was less than 1 percent over the jury's award and is not in question here.” (*Id.* at p. 1764.)

In *New Haven Unified School Dist. v. Taco Bell Corp.*, *supra*, 24 Cal.App.4th 1473, Division One of this district held that the trial court had erred in awarding litigation expenses to the defendant. It concluded that there was no basis for finding the school district's offer unreasonable or for finding the owner's demand reasonable. In so concluding, the appellate court recognized that the owner had supported its analysis with highly qualified expert witnesses and sophisticated analyses and that the "trial court may consider ' "the good faith, care and accuracy in the determination" ' of offer and demand. [Citations.] But the trial court's award here was only about one-half the amount of the demand and must be reduced further. We have found no precedent for awarding litigation expenses where the demand is so disproportionate to the actual award." (*Id.* at pp. 1485-1486.)

Owners argue that *Pinole Point*, *supra*, 27 Cal.App.4th 1105 is erroneous and that it and other cases suggesting evenhanded application of the factors developed by case law have been superseded by the California Supreme Court opinion in *Continental*, *supra*, 16 Cal.4th 694.

In *Continental*, *supra*, 16 Cal.4th 694, the Supreme Court held that the Court of Appeal had erred in finding the trial court's denial of litigation expenses to the owner was an abuse of discretion. (*Id.* at p. 722.)⁵³ The condemner's final offer was \$200,000 and the owner's final demand was \$500,000. (*Id.* at p. 721.) The jury awarded the owner more than \$1 million in severance damages. (*Id.* at p. 701.) *There was no issue regarding the reasonableness of the owner's demand.* The sole question was whether the trial court abused its discretion in denying litigation fees in light of the absolute and percentage disparities between the offer and the severance damages awarded. In this context, the Supreme Court described the factors relevant to consideration of the

⁵³ As discussed heretofore, the Supreme Court reversed the judgment and remanded for further proceedings upon holding that the trial court had erred in limiting the transportation authority's entitlement to severance damages offset to "special" benefits. The court addressed the litigation expenses issue "[f]or guidance on retrial." (*Continental*, *supra*, 16 Cal.4th at p. 719.)

reasonableness of the offer. “Several factors have emerged as general guidelines for determining the reasonableness or unreasonableness of offers. They are ‘ “(1) the amount of the difference between the offer and the compensation awarded, (2) the percentage of the difference between the offer and award . . . and (3) the good faith, care and accuracy in how the amount of offer and the amount of demand, respectively, were determined.’ ” [Citation.] Thus, the mathematical relation between the condemner’s highest offer and the award is only one factor that should enter into the trial court’s determination. [Citations.]” (*Id.* at p. 720.) The Supreme Court noted its “disapproval of any pronouncement purporting to find unreasonableness as a matter of law based purely on mathematical disparity, and to commend the lower courts in every case to consider not only the numerical figures, but also ‘ “ ‘the good faith, care and accuracy in how the amount of the offer and the amount of the demand, respectively, were determined.’ ” [Citations.]” ’ [Citation.]” (*Id.* at pp. 720-721.) Examining the court’s reasons for denying the owner its litigation expenses, the Supreme Court set forth the reasoning of the trial court at length, and concluded that the Court of Appeal had erred in finding an abuse of discretion based primarily upon the disparity between the offer and the jury award of severance damages. The appellate court had also determined that the agency had acted unreasonably with respect to its view that the property would be benefited by proximity to the project. Having concluded that the evidence was admissible, the agency could not be found to have acted in bad faith or unreasonably by adhering to that view of the evidence. The Supreme Court therefore concluded that the trial court had acted within its discretion in denying the owner’s their litigation expenses. (*Id.* at p. 722.)

Owners cling to *Continental*’s summary of the factors determining the reasonableness or unreasonableness of offers as support for their assertion that to assess the reasonableness of demands, only the good faith, care and accuracy in how the demand was determined are relevant. However, as we have pointed out, there was no issue in *Continental* as to the reasonableness of the demand as it was lower than the jury verdict. The court itself stated it was reviewing the factors serving as “general guidelines for determining the reasonableness or unreasonableness of offers.” (*Continental, supra,*

16 Cal.4th at p. 720.) There was no reason for the court to examine the demand to see how it compared mathematically with the verdict. Nowhere in the discussion does the court indicate it was forging a new rule treating offers and demands differently. Nowhere does the court indicate that the analysis of the reasonableness of an owner's demand begins and ends with a determination whether the offer was prepared in good faith, with care and accuracy.

The purpose of section 1250.410 is twofold. The statute “promote[s] settlement of valuation disputes in eminent domain proceedings and guarantee[s] full recompense to the landowners in case of unnecessary litigation. [Citations.] However, we think it is clear that it was also the purpose of the section to impose upon *both* parties to the litigation the duty to act reasonably in an effort to settle the disputes.” (*People ex rel. Dept. of Transportation v. Patton Mission Properties* (1979) 89 Cal.App.3d 204, 213.) A standard that countenanced exorbitant and unrealistic demands by property owners so long as they could show they used good faith and care—perhaps by relying upon their expert's opinions—would undermine the purpose of the statute.

Subsequent cases quoting the guidelines as stated in *Continental, supra*, 16 Cal.4th 694, also involve challenges to the finding that condemner's *offer* was or was not reasonable. (See *Casa Suenos, supra*, 129 Cal.App.4th at pp. 985-987 [affirming finding of reasonableness of the offer despite mathematical disparity where legal issue on which district based its position was novel, complex and legitimate]; *Rudvalis, supra*, 109 Cal.App.4th 667, 690-691 [on appeal by the city, after striking economic damage awards, the court remanded the question of litigation expenses “for reconsideration in light of the respective parties' offers and demands and remaining factors listed above”]; *Moulton Niguel Water Dist. v. Colombo, supra*, 111 Cal.App.4th at pp. 1212-1218 [despite mathematical disparity between offer and jury verdict, trial court independently evaluated the reasonableness of the offer and did not rely solely on the relationship of the offer to the ultimate award and substantial evidence supported court's determination that the condemner's offer was reasonable]; see also *Woodson, supra*, 93 Cal.App.4th 954 [no

challenge to reasonableness of owners' final demand; court affirms denial of fees on ground offer was reasonable, despite mathematical disparity between offer and verdict].)

We conclude that the trial court applied the correct standard to evaluate the reasonableness of SamTrans's offer and Owners' demand. We turn to the question whether the court correctly applied that standard. We conclude that substantial evidence supports the court's conclusion that Owners' final demand was unreasonable.⁵⁴

The mathematical disparity (both proportional and absolute) between the final demand and the jury verdict was very large. As the court found: "Defendants' demand was 74% higher than the award."⁵⁵ In absolute terms, the total demand was \$21,856,236 more than the award.

The trial court did not rest its decision on the mathematical disparities alone, but independently reviewed the reasonableness of the offer and the demand in light of the evidence presented. The court stated at the hearing on the motion that if reasonableness were based solely upon the mathematical relationship between the offer and the verdict, it would "find [Owners'] demand per se unreasonable." However, the court expressly recognized that "[t]he case law [says] it is error to rest on the mathematical calculations. You must look at the other factors."

"The reasonableness of the offer and demand must be considered in view of the facts as each party knew them before the original trial date. [Citation.]" (2 Matteoni & Veit, *supra*, § 10.30, p. 652.) Owners argue that they based their final offer on their experts' opinions and did not know until the court's later in limine rulings that the "bone" would not be considered part of the larger parcel or that they would be unable to claim

⁵⁴ We need not determine in light of this conclusion whether SamTrans's offer was unreasonable, as found by the court. Nor need we address the court's finding that it could not say that the parties had acted without good faith, care or accuracy in arriving at their respective final offer and demand.

⁵⁵ Looking only at severance damages, the demand was still 62 percent higher than the award if all severance damages awarded are calculated against the \$31,500,000 final demand, and 81 percent higher if the award is reduced, as we have held required, to parking-related severance damages awarded of \$17,326,600.

damages for their fee interest in Huntington Avenue. They further argue that they reduced their final demand \$20 million from their expert's initial \$51 million valuation. However, the court specifically found that Owners' demand for a "gold-plated" replacement garage was unreasonable. It found that the Owners' demand was based upon "an adamant refusal to consider any plans for less than 'gold-plated' garage. In every respect, defendants sought damages based on a garage with design features far in excess of those currently enjoyed. Defendants also argue that they reduced their demand by 40% prior to trial (plaintiff[] state[s] that defendants are misleading and the actual reduction was 27% in terms of its total demand as opposed to their severance damage claim only.) In any event, a 40% reduction did not bring the demand into the realm of reasonableness based on the jury verdict."

The record shows that the court independently evaluated the reasonableness of the offer and the demand in accord with the factors set forth in the statute and the case law. In finding the demand unreasonable, the court did not rely only on the mathematical disparity between the demand and the verdict, but considered the demand in light of the evidence presented. Nor is the court's refusal to find that Owners acted without good faith, care or accuracy in formulating their demand, controlling here. That third prong of the guidelines is one factor to be considered and the court clearly did so here. It concluded that the "third prong of the statutory test does nothing to rescue either side in this case from a finding of unreasonableness." Although the court could have determined otherwise than it did, or weighed the evidence differently, we cannot say that it abused its discretion in concluding that the demand was unreasonable and in denying litigation expenses on that basis.

Disposition

We reverse that portion of the severance damages attributable to loss of development rights (in other words that portion of severance damages awarded by the jury not identified in the special verdict as attributable to parking loss). We reverse the award of severance damages to TPSC LP and modify the judgment to reallocate that severance damages award attributable to parking loss among the other Owners as set

forth herein. In all other respects, the judgment is affirmed. Each party is to bear its own costs on appeal.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.